

IN THE ARBITRATION UNDER CHAPTER ELEVEN  
OF THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES  
BETWEEN

METHANEX CORPORATION,

*Claimant/Investor,*

*-and-*

UNITED STATES OF AMERICA,

*Respondent/Party.*

**REPLY MEMORIAL OF RESPONDENT  
UNITED STATES OF AMERICA ON  
JURISDICTION, ADMISSIBILITY AND  
THE PROPOSED AMENDMENT**

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**REPLY EXPERT REPORT OF DETLEV F. VAGTS**

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In accordance with the Tribunal's order of February 27, 2001, the United States respectfully submits this Reply Memorial on jurisdiction, admissibility and the question of whether Methanex's proposed amendments may or should be allowed under Article 20 of the UNCITRAL Arbitration Rules.

**PRELIMINARY STATEMENT**

Methanex's attempt to reinvent its case in its Counter-Memorial and its Draft Amended Claim fails. Its claims, whether as originally stated or as recast in its Draft Amended Claim, are neither within the Tribunal's jurisdiction nor, on their face, admissible.

*First*, Methanex errs in asserting that the phrase “arising out of” in Article 1116(1) should be read like an insurance clause allowing remote claims. The NAFTA is not an insurance contract, and it is not governed by municipal law, as Methanex suggests. International tribunals have repeatedly found international claims agreements to incorporate the requirement of proximate causation. Application of international law to the text of Article 1116(1) compels the same result here. Because the pleadings leave no doubt that Methanex’s claims are too remote, those claims should be dismissed.

*Second*, Methanex’s new claim of a national-treatment violation is patently baseless. The California measures do not distinguish between U.S.-owned and Canadian-owned companies. Nor is there any merit to Methanex’s attempt to find a national-treatment violation in the measures’ different treatment of different products. The measures provide Methanex and its investments with precisely the same treatment that they accord to U.S. investors and their investments in the methanol industry. Because the measures treat Methanex and its investments like U.S.-owned investors and their investments *in like circumstances*, its Article 1102 claim is meritless on its face.

*Third*, Methanex’s new approach to Article 1105(1)’s minimum standard of treatment is to throw out a wide assortment of novel theories in the hope that one will stick. None does. Each of the new “principles” of international law asserted in the Draft Amended Claim either does not exist, or, like the full protection and security obligation, has no application to the measures at issue here.

*Fourth*, Methanex’s search for an “investment” that could be expropriated under Article 1110 has not borne fruit. Methanex US and Methanex Fortier are indisputably “investments” – but Methanex does not, and cannot, allege that California has taken

either away from it. Methanex does not deny that, under customary international law, market share, customer base and goodwill are not, by themselves, property interests capable of being expropriated. Neither of the Chapter Eleven awards Methanex relies upon supports its position to the contrary.

*Fifth*, because it cannot have suffered any legally cognizable injury as a result of a ban that does not go into effect until 2003, Methanex attempts to confuse the issue by attacking an argument the United States never made. And, inexplicably, Methanex still refuses to submit waivers in conformity with the jurisdictional prerequisites set forth in the NAFTA.

*Finally*, Methanex's proposed amendment should be disallowed on discretionary grounds. Where, as here, proposed amendments assert a completely new claim based on new facts and legal theories, tribunals applying the UNCITRAL Arbitration Rules have repeatedly disallowed the amendments – particularly where, as here, the party proposing the amendment offers no justifiable excuse for its delay and prejudice would result for the opposing party.

### **NEW ALLEGATIONS OF FACT<sup>1</sup>**

In its Draft Amended Claim, Methanex makes four, broad new allegations of fact. First, Methanex alleges that another chemical, ethanol, is an oxygenate that directly competes with MTBE in the market for gasoline additives. *See* Draft Amended Claim at 7. Ethanol, which is made from renewable feedstocks such as corn, benefits from

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<sup>1</sup> The facts relied upon by the United States in this Reply Memorial are those pleaded by Methanex in its original and proposed amended claims, and certain additional facts that cannot reasonably be disputed. The United States expressly reserves its right to controvert Methanex's allegations if it becomes necessary to do so.

subsidies in the United States. *Id.* at 7-8. Methanex asserts that “using ethanol as a gasoline oxygenate may be environmentally harmful.” *Id.* at 10.

Methanex alleges that Archer-Daniels-Midland (“ADM”), the principal producer of ethanol in the United States, has led a public-relations campaign to promote ethanol at the expense of MTBE. *Id.* at 12-13. As part of that campaign, ADM and others characterized MTBE and methanol as “foreign,” dangerous and environmentally unsafe products. *Id.* at 13-20. ADM also made substantial campaign contributions and engaged in vigorous lobbying efforts. *Id.* at 21-24.

Methanex avers that then-gubernatorial candidate Davis met with ADM in the summer of 1998 and received over \$150,000 from ADM in contributions toward his campaign for Governor of California. *Id.* at 29-31. Methanex disavows, however, any suggestion that “the acts of Governor Davis or ADM in any way violated U.S. law.” *Id.* at 51. Methanex thus concedes that the Governor acted without “any agreement or understanding that his vote, opinion, or action upon any matter” would be influenced by campaign contributions.<sup>2</sup>

Finally, Methanex now identifies the CaRFG3 Regulations as a measure allegedly violating Section A of NAFTA Chapter Eleven. *Id.* at 32-33. Those regulations provide, in pertinent part, that “[s]tarting December 31, 2002, no person shall sell, offer for sale, supply or offer for supply California gasoline which has been produced with the use of

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<sup>2</sup> CAL. PENAL CODE § 68 (Deering 2001); *see also Woodland Hills Residents Ass’n v. City Council*, 26 Cal.3d 938, 947, 609 P.2d 1029, 1033 (1980) (noting that California “[p]ublic policy strongly encourages the giving and receiving of campaign contributions. Such contributions do not automatically create an appearance of unfairness. Adequate protection against corruption and bias is afforded through the Political Reform Act and criminal sanctions.”).

methyl tertiary-butyl ether (MTBE).”<sup>3</sup> Methanex alleges that the CaRFG3 Regulations and the Executive Order discriminate in favor of ethanol producers to the detriment of producers of MTBE and, therefore, suppliers to MTBE producers such as methanol manufacturers, as well. Draft Amended Claim at 1, 32.

### **APPLICABLE STANDARDS**

It is common ground between the United States and Methanex that a claimant must “*credibly allege* the factual elements of a claim” under Chapter Eleven in order for the claim to fall within the scope of the respondent’s consent to arbitration. Counter-Memorial at 2 (emphasis added). As demonstrated in the Memorial and in this Reply, this Tribunal lacks jurisdiction because Methanex’s original claims do not credibly allege the following: (i) a breach of an obligation set forth in Section A of Chapter Eleven; (ii) legally cognizable loss or damage; or (iii) loss or damage that has been suffered by reason of, or arising out of, the challenged measure.

The United States and Methanex also agree on the standards applicable to Methanex’s proposed amendment. First, the Tribunal must, applying the standard just stated, determine whether the proposed amended claims would be within its jurisdiction. *See* UNCITRAL Arbitration Rules art. 20 (“claim may not be amended in such a manner that the amended claim falls outside the scope of the . . . arbitration agreement”). Second, the Tribunal should examine the proposed amended claims to assess whether, as pleaded, they lack legal merit. The disputing parties agree that, if the proposed amended claims are baseless on their face, the Tribunal may disallow the

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<sup>3</sup> 13 CAL. ADMIN. CODE § 2262.6(a)(1) (West 2000).



amendment on the ground that “other circumstances” within the meaning of Article 20 are present.<sup>4</sup>

As demonstrated below, Methanex’s proposed amendments are either not within the Tribunal’s jurisdiction or are patently baseless.<sup>5</sup>

## **OBJECTIONS TO JURISDICTION AND ADMISSIBILITY**

### **I. METHANEX’S ALLEGED INJURIES ON THEIR FACE ARE TOO REMOTE**

In its Memorial, the United States established that claims too far removed from the alleged wrongful acts are not cognizable under international law. The United States demonstrated that this principle is reflected in the requirement in NAFTA Articles 1116 and 1117 that the claimed loss be “by reason of, or arising out of,” the alleged breach of Chapter Eleven (or certain Articles of Chapter Fifteen that are not relevant here). The Memorial further established that where, as here, the alleged injuries result entirely from an impact of the alleged breach on third parties with which the claimant has a contractual

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<sup>4</sup> See Claimant Methanex Corporation’s Motion to Amend Its Statement of Claim Pursuant to Article 20 of the UNCITRAL Arbitration Rules, dated January 12, 2001, at 1 (“[F]rivolous or vexatious” amendment should be disallowed.).

<sup>5</sup> Although none of the United States’ objections here depend on the restrictive interpretation doctrine, the United States notes that Methanex’s assertion that the Vienna Convention on the Law of Treaties (“Vienna Convention”) displaced the doctrine in all contexts is erroneous. See Counter-Memorial at 2-4. In a decision post-dating the adoption of the Vienna Convention, the International Court of Justice (“ICJ”) affirmed the continued application of the doctrine in the context of binding unilateral acts by a State: “When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.” *Nuclear Tests II* (Austl. v. Fr.), 1974 I.C.J. 253, 267 ¶ 44 (Dec. 20). This holding is significant because Chapter Eleven is, for pertinent purposes, such a unilateral statement: the Chapter is both an agreement among the three NAFTA Parties and, with respect to individual investors such as Methanex, a binding unilateral statement that a NAFTA Party will submit certain types of claims to arbitration under specified conditions. The parties agree as to this dual nature of Chapter Eleven. See Joint Letter from Methanex and United States to Tribunal of July 17, 2000, at 1-2 (“An agreement to arbitrate Chapter 11 claims is formed by the consent given by each State Party ‘to submission of a claim to arbitration in accordance with the procedures set out in this Agreement’ and the investor’s corresponding

relationship, the claim is too remote to fall within the scope of the consent to arbitration in Articles 1116 and 1117. *See* Memorial at 15-30.

In its Counter-Memorial, Methanex does not dispute that international law bars claims that are too indirect. It does not contest that claims of loss based solely on an alleged breach's impact on the claimant's contractual counterparties are too remote to be cognizable. Nor does Methanex contend that the measures at issue here affect it in any way other than through their potential impact on producers of MTBE, with which it hopes to do business in the future.

Instead, Methanex erroneously contends – relying on national judicial decisions construing insurance agreements governed by the municipal laws of Australia, Canada, Britain and the United States – that the NAFTA's mere use of the words “arising out of” in Articles 1116 and 1117 reflects an intent on the part of the NAFTA Parties to exponentially increase their liability for claims in a manner not contemplated by general international law. It urges that issues of causation and remoteness are intrinsically bound up with the merits. And it contends that its allegation that California intentionally discriminated in favor of ethanol producers transforms an injury that is too indirect into one that is actionable.

For the reasons that follow, Methanex's contentions are without merit.

**A. Articles 1116(1) And 1117(1) Are Governed By International Law,  
Not Municipal Insurance Law**

Methanex's reliance on the meaning ascribed to the phrase ““arising out of the use or operation”” of a motor vehicle by national courts construing insurance contracts is

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consent to arbitrate in accordance with those procedures.”) (emphasis omitted) (quoting NAFTA art.

misplaced.<sup>6</sup> Indeed, Methanex’s reliance on these authorities is consistent with its overall approach in this arbitration, which appears to proceed from the assumption that the NAFTA is a form of all-risk insurance policy with no premiums, no deductible and no limits. The NAFTA, of course, is not an insurance policy. Rather, it is an international agreement, governed by international law, by which the NAFTA Parties agreed to comply with the specific obligations stated therein and no more.

That the NAFTA is to be interpreted “in accordance with applicable rules of *international law*” firmly establishes that Methanex’s municipal-law authorities are irrelevant to the issues before this Tribunal.<sup>7</sup> A review of international authorities – which *are* relevant to the Tribunal’s task – establishes that States have, over the past two centuries, used a wide variety of clauses in international agreements submitting claims to arbitration – some quite similar to Articles 1116 and 1117, some broader in their language and scope. Such clauses, however, uniformly have been interpreted to exclude claims on remoteness grounds.

The most recent and closest example is that of the Algiers Accords, which granted the Iran-United States Claims Tribunal jurisdiction over claims that “*arise out of . . . measures affecting property rights.*”<sup>8</sup> As observed in the Memorial, the Iran-United States Claims Tribunal has interpreted this provision to provide jurisdiction only over claims that meet the customary international law standard of proximate causation, and,

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1122(1)).

<sup>6</sup> See Counter-Memorial at 32 (quoting *Chan v. Insurance Corp. of Brit. Colum.*, [1996] A.C.W.S.J. 78003, ¶ 20).

<sup>7</sup> NAFTA art. 102(2) (emphasis added); see also *id.* art. 1131(1) (tribunal shall decide issues “in accordance with this Agreement and applicable rules of international law”).

<sup>8</sup> Declaration of Algeria Concerning the Settlement of Claims (Claims Settlement Declaration), Jan. 19, 1981, U.S.-Iran, art. II(1), 20 I.L.M. 230 (1981) (emphasis added).

therefore, to require dismissal of claims that are too remote.<sup>9</sup> That tribunal's interpretation of a substantially similar clause in a claims agreement governed by international law provides persuasive evidence of the content of the phrase "arising out of" in Articles 1116(1) and 1117(1).

Methanex offers its view of this authority in a footnote, where it argues only that *Hoffland Honey* (the first of the decisions of the Iran-United States Claims Tribunal construing this phrase in the Algiers Accords) addressed "unusual and bizarre circumstances" and "must be limited to its extreme facts." Counter-Memorial at 34 n.12. Neither the tribunal's decisions subsequent to *Hoffland Honey*, including *Mohsen Asgari Nazari* and *Behring Int'l*, nor the commentators agree with Methanex's attempt to limit the import of *Hoffland Honey*.<sup>10</sup> Moreover, the relevant "fact" for the purpose of determining whether *Hoffland Honey* is relevant here is the text of the Algiers Accords, which remained the same on each of the occasions on which the tribunal confirmed that the principle of proximate causation is incorporated in the phrase "arises out of."

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<sup>9</sup> Memorial at 16-17; see *Mohsen Asgari Nazari v. Iran*, 1994 WL 109558, at 54 (Aug. 24, 1994) (Award No. 559-221-1) (noting lack of "evidence that the Respondent is culpable for proximate causation of the Claimant's loss . . ."); *Behring Int'l, Inc. v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 238, 271 (June 21, 1985) (Award No. 52-382-3) ("[T]he Tribunal has jurisdiction to adjudicate a counterclaim for all reasonably foreseeable damages . . . proximately caused by such breach . . ."); *Hoffland Honey Co. v. Nat'l Iranian Oil Co.*, 2 Iran-U.S. Cl. Trib. Rep. 41 (Jan. 26, 1983) (Award No. 22-495-2) (discussed in Memorial); see also *Leach v. Iran*, 23 Iran-U.S. Cl. Trib. Rep. 233, 239 (Oct. 6, 1989) (Award No. 440-12183-1) (Noori, J. SEP. OP.) (claim did not "arise out of" Iranian measures as claimant's employer's "decision was the actual, proximate and direct cause of the termination of contracts . . .").

<sup>10</sup> See CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 459 (1998) (stating that "[e]ven where the claimant can prove that actions attributable to the Government of Iran were a cause of damages, recovery still will be denied unless its actions were the *proximate* cause. . . . The [*Hoffland Honey*] Tribunal correctly drew a distinction . . . between 'cause' and 'proximate cause' . . . ."); THE AMERICAN SOCIETY OF INTERNATIONAL LAW, *IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY* 318 (Richard B. Lillich & Daniel Barstow Magraw eds., 1997) ("It is further a basic premise that one is not liable for every harm that is caused. As discussed above, the tribunal in *Hoffland Honey* endorsed the general limiting principle of 'proximate cause,' which requires that the link between action and compensable harm be reasonably direct and obvious.").

The German-United States Mixed Claims Commission provides an example of an international tribunal construing even broader treaty language to similar effect. A series of treaties with Germany following World War I granted the commission jurisdiction over claims by American nationals who “suffered, through the acts of the Imperial German Government, or its agents, . . . loss, damage, or injury to their person or property, *directly or indirectly* . . . or in consequence of hostilities or of any operations of war *or otherwise*.”<sup>11</sup> Rejecting an argument that this treaty text contemplated a standard of causation broader than proximate causation, the German-United States Mixed Claims Commission found that proximate cause was a necessary element to bring any claim within the jurisdiction established under the treaty, notwithstanding the text’s express reference to indirect losses:

The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany’s act as a proximate cause?

. . . [T]he contention of American counsel . . . must be rejected. The argument, pressed to its logical conclusion, would fix liability on Germany . . . for *all* costs or consequences of the war, direct or remote, to the extent that such costs were paid or losses suffered by American nationals. . . . The mere statement of the extreme lengths to which the interpretation we are asked to adopt carries us demonstrates its unsoundness.<sup>12</sup>

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<sup>11</sup> *Administrative Decision No. II*, 7 R.I.A.A. 23, 29 (Germ.-U.S. Mixed Cl. Comm’n 1923) (quoting section 5 of July 2, 1921 Joint Resolution of Congress) (emphasis added). The claims commission was established by a bilateral agreement between Germany and the United States, which submitted to arbitration certain “categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles . . . .” Agreement on Mixed Claims Commission, Aug. 10, 1922, U.S.-Germ., art. I, 42 Stat. 2200. The Treaty of August 25, 1921, in turn, reproduced in its preamble the joint resolution of Congress quoted in the text and incorporated its terms into the substantive obligations of the treaty, prescribing that Germany would accord the United States “all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921 . . . .” Treaty on Establishment of Friendly Relations, Aug. 25, 1921, U.S.-Germ., art. I, 42 Stat. 1939.

<sup>12</sup> *Administrative Decision No. II*, 7 R.I.A.A. at 30; *see id.* at 32 (“Applying the rule of proximate cause to the provisions of Administrative Decision No. I [addressing the scope of claims within the commission’s

As noted in the Memorial (at 19, 24), the German-United States Mixed Claims Commission relied on this interpretation of “directly or indirectly” in several cases, including *Provident Mutual Life Ins.*, 7 R.I.A.A. 91, 112-13 (Germ.-U.S. Mixed Claims Comm’n 1923), and *United States Steel*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (Germ.-U.S. Mixed Claims Comm’n 1923).

The Mexico-United States claims convention of 1923 provides another example of a compromissory clause containing language similar to the phrase “arising out of” in Articles 1116(1) and 1117(1): it provided, among other things, for arbitration of “all claims for losses or damages *originating from* acts of officials or others acting for either Government and resulting in injustice . . . .”<sup>13</sup> The Mexican-United States General Claims Commission did not construe the phrase “originating from” as relaxing the traditional standard of proximate causation; instead, it held that “only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action].”<sup>14</sup> Other international tribunals applying international law have similarly construed a wide variety of different treaty language to be consistent with the customary international law principle that remote claims – *i.e.*, claims where proximate cause is lacking – may not proceed.<sup>15</sup>

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jurisdiction], no difficulty should be experienced in determining what claims fall within its terms.”); *id.* at 25 (“When the allegations in a petition or memorial presented by the United States bring a claim within the terms of the Treaty, the jurisdiction of the Commission attaches. . . . Should the Commission so decide such issue that the claim does not fall within the terms of the Treaty, it will be dismissed for lack of jurisdiction.”).

<sup>13</sup> Convention for Reciprocal Settlement of Claims, Sept. 8, 1923, U.S.-Mex., art. I, 43 Stat. 1730 (emphasis added).

<sup>14</sup> *H.G. Venable*, 4 R.I.A.A. 219, 225 (Mex.-U.S. Cl. Comm’n 1927) (cited in Memorial at 19 n.34).

<sup>15</sup> *Compare Elettronica Sicula, S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15, 41 ¶ 48 (quoting compromissory clause as encompassing “[a]ny dispute between the High Contracting Parties as to the interpretation or the application of this Treaty . . . .”) with *id.* at 62 ¶ 101 (rejecting claim on ground that

These international tribunals reached the same result in construing differing language for the reasons outlined in the United States' Memorial: unless a different intent unmistakably appears from the text, for a claim to be submitted to international arbitration, the ordinary standard – that of proximate cause – for the relationship between an alleged breach and an alleged loss applies. As Umpire Ralston stated in the *Sambiaggio* case, if the governments intended to depart from the general principles of international law, then the “agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.”<sup>16</sup> Like the provisions of each of the international claims agreements reviewed above, Articles 1116(1) and 1117(1) contain no indication that the NAFTA Parties intended to vary from

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U.S. failed to establish that acts attributable to Italy rather than “ELSI's headlong course towards insolvency” were proximate cause of losses); *compare Northern Cameroons* (Cameroon v. U.K.), 1963 I.C.J. 15, 25 (Dec. 2) (quoting compromissory clause as encompassing “any dispute whatever [that] should arise . . . relating to the interpretation or application of the provisions of this Agreement . . .”) (emphasis added), *with id.* at 99 (SEP. OP. Judge Sir Gerald Fitzmaurice) (noting that had the applicant sought reparation, it would have been required to establish “that these breaches were the actual and proximate cause of the damage alleged to have been suffered.”); *compare* Convention on Claims for Damages Resulting from Smelter at Trail, Apr. 15, 1935, U.S.-Can., art. III(1), 49 Stat. 3245 (tribunal shall decide “[w]hether damage caused by the Trail Smelter in the State of Washington has occurred . . .”) *with Trail Smelter* (U.S. v. Can.), 3 R.I.A.A. 1906, 1931 (first decision 1938) (rejecting claim for indirect damages arising from unintended and incidental interference with contractual relations with third parties) (cited in Memorial at 27); *compare* Declaration of Algeria (General Declaration), Jan. 19, 1981, U.S.-Iran, art. 16, 20 I.L.M. 224, 228 (1981) (“[I]f any dispute arises between the parties as to whether the United States has fulfilled [certain] obligation[s] . . . , Iran may submit the dispute to binding arbitration . . .”), *with Iran v. United States*, Award No. 597-A11-FT (April 7, 2000), ¶¶ 268, 275, 280, 291 (tribunal would “determine in a subsequent proceeding whether Iran has established that it has suffered a loss as a proximate result of that failure by the United States.”) (emphasis added); *compare* Protocol for Arbitration of Claims, Feb. 17, 1903, U.S.-Venez., art. I, T.S. No. 420 (“All claims owned by citizens of the United States of America against the Republic of Venezuela . . . shall be examined and decided by a mixed commission . . .”), *with Dix*, 9 R.I.A.A. 119, 121 (U.S. -Venez. Comm’n of 1903) (“International law as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure.”).

<sup>16</sup> 10 R.I.A.A. 499, 521 (Italy-Venez. Mixed Cl. Comm’n of 1903); *see also Asian Agricultural Products Ltd. v. Sri Lanka* (“AAPL”), 30 I.L.M. 577, 601 (1991) (“[I]n the absence of travaux préparatoires in the proper sense, it would be almost impossible to ascertain whether Sri Lanka and the United Kingdom had contemplated during their negotiations the necessity of disregarding the common habitual pattern adopted by previous treaties . . .”); Memorial at 12-13 n.28.

centuries of claims practice and dramatically expand the number and range of claims for which they would be liable.<sup>17</sup>

Moreover, the insurance contracts on which Methanex bases its contention that “arising out of” incorporates a broader standard of causation than proximate cause have a fundamentally different object, purpose and context than that of Chapter Eleven. On policy grounds, national courts construe provisions in insurance contracts broadly in favor of insureds.<sup>18</sup> Insurance contracts are the product of commercial transactions where insurers assume the risk of certain losses in exchange for payments. Chapter Eleven, in contrast, is not a liability-shifting mechanism. Instead, it imposes on a State legal obligations with respect to certain foreign investors and foreign-owned investments and creates a private right of action for monetary damages for violations of those obligations. As such, a NAFTA Party’s liability under Chapter Eleven is more analogous to that of a wrongdoer for a tort or a violation of a statutory requirement under municipal law – an area where, under municipal law, liability traditionally has been limited by the principle of proximate cause. Thus, neither international law nor the policy rationale

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<sup>17</sup> Moreover, if the NAFTA Parties intended to depart from the well-established principle of proximate cause, then they would not have used the language “by reason of” in Articles 1116(1) and 1117(1). Nor would they have added the phrase “arising out of” based merely on the supposition that tribunals would ignore the “by reason of” language and apply an undefined, substantially more expansive causation standard drawn not from international law, but from municipal law interpreting insurance provisions.

<sup>18</sup> See, e.g., *Amos v. Insurance Corp. of Brit. Colum.*, 3 S.C.R. 405, 1995 S.C.R. LEXIS 663, at \*16 (1995) (“Traditionally, the provisions providing coverage in private policies of insurance have been interpreted broadly in favour of the insured, and exclusions interpreted strictly and narrowly against the insurer.”); *Dodson v. Peter H. Dodson Ins. Servs.*, [2001] 1 Lloyd’s Rep. 520, 2000 WL 1791537, ¶ 41 (C.A. 2000) (“In case of any ambiguity (and this is in our view, at lowest, such a case), an insurance wording such as the present falls to be construed against the insurers whose standard wording it is and who put it forward contractually in apparently general terms and then seek to read into it an unexpressed restriction on their liability.”); *Merchants Ins. Co. of New Hampshire Inc. v. US Fidelity & Guar. Co.*, 143 F.3d 5, 8 (1st Cir. 1998) (“Where policy provisions are ambiguous – that is, where the language permits more than one rational interpretation – the reading most favorable to the insured must prevail. That contra proferentem principle applies with added rigor in determining the meaning of exclusionary provisions.”) (internal quotations, citations and footnote omitted); 2 GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW § 15:74



underlying the municipal-law decisions Methanex invokes supports applying the substantially broader standard applied in the insurance law context to Chapter Eleven arbitration.

Finally, the United States briefly notes that the treaty interpretation arguments advanced by Methanex lack merit for two other reasons. First, Methanex's suggestion that the ordinary meaning of the word "or" requires "arising out of" to have a different meaning than "by reason of" is wrong as a matter of simple grammar: "or" can be and often is used to introduce synonymous terms.<sup>19</sup> For example, in Articles 1116(1) and 1117(1), the terms "loss" and "damage" are interchangeable; the terms "by reason of" and "arising out of" are similarly interchangeable. Second, as stated at length in the Memorial (at 16-20), construing Articles 1116(1) and 1117(1) to incorporate the proximate-causation standard accords with the NAFTA's object and purpose, is consistent with rules of customary international law in force for the NAFTA Parties and avoids potentially unreasonable results. For all these reasons, the Tribunal should reject Methanex's suggestion that it import into the NAFTA a causation standard founded in municipal insurance law.

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(2d ed., rev. vol. 1984) ("The words, 'the contract is to be construed against the insurer' comprise the most familiar expression in the reports of insurance cases.").

<sup>19</sup> See OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH (1980) (defining "or" as "also known as" and providing the example "*hydrophobia or rabies*"); WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 826 (1988) (defining "or" as "a synonymous or equivalent expression" and providing the example "*claustrophobia, or fear of enclosed places*"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 873 (2d ed. 1985) (defining "or" as "used to indicate a synonymous or equivalent expression" and providing the example "*acrophobia, or fear of great heights*"); CONCISE OXFORD DICTIONARY 716 (1982) ("or" may be used as a "mere synonym (*common or garden heliotrope*)") (emphasis in original).

**B. No Evidentiary Hearing Is Necessary Where, As Here, The Undisputed Facts Establish That The Claim Is Too Remote**

Methanex's observation that, in appropriate cases, international tribunals find questions of causation to be intertwined with the merits misses the point. *See* Counter-Memorial at 35-37. The United States agrees that in some cases the determination of whether a claim is too remote depends on disputed facts and is not capable of resolution as a preliminary question. This arbitration, however, is not such a case.

In its Memorial, the United States observed that, as pleaded, each of the supposed injuries alleged by Methanex depended on an attenuated chain of causation. Memorial at 22-23. In sum, any impact on Methanex will result only from anticipated effects of the measures on gasoline suppliers, which will result in secondary effects on their supply contracts with MTBE producers, which, in turn, will result in tertiary effects on methanol producers like Methanex. *Id.* at 23. The United States further noted that international tribunals have routinely held injuries such as these to be too remote under international law. *Id.* at 23-30.

In its Counter-Memorial, Methanex does not dispute – for it cannot – that its claims depend on the attenuated chain of causation noted in the Memorial. Instead, Methanex conclusorily describes its alleged injuries as “direct” and, curiously, points to alleged changes in its share price on a regional exchange even though it has disavowed any reliance on share value as a measure of its injury.<sup>20</sup> Counter-Memorial at 36.

Methanex does not, however, suggest that the chain of causation here is any other than that observed in the United States' Memorial. Nor, more importantly, does it

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<sup>20</sup> *See* Methanex's Reply to Statement of Defense at 16 (“Methanex' damage claim is not based on a loss of share value.”).

identify any issue of *fact* that requires resolution in order to determine whether its claims fall within the scope of the United States' consent to arbitrate under Chapter Eleven, or are otherwise admissible under international law. To the contrary, the pleadings before the Tribunal clearly show that this is a case so far removed from the accepted category of claims in international law that it is outside the agreement to submit to arbitration under Chapter Eleven. *See, e.g., Hoffland Honey*, 2 Iran-U.S. Cl. Trib. Rep. 41 (jurisdiction lacking where pleadings established that claim was too remote to be cognizable).

**C. Methanex's Intentional Discrimination Claim Does Not Make Its Alleged Injuries Any Less Indirect**

Methanex's addition in its Draft Amended Claim of an allegation of intentional discrimination does not change the attenuated chain of causation upon which its claims are founded. Because Methanex fails credibly to allege that the measures discriminate against foreign-owned producers and marketers of *methanol* at all, the United States needs not address Methanex's additional contention that the supposed discrimination was intentional.<sup>21</sup>

Methanex's new allegation is that the measures at issue discriminate against Canadian investors and Canadian-owned investments *simply by favoring the ethanol industry* in the market for additives to California's gasoline. Methanex's allegation is

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<sup>21</sup> The United States notes, nonetheless, that although Methanex often repeats the assertion that the alleged discrimination was intentional, Methanex fails credibly to allege that this is so. Even assuming all the facts pleaded in the Draft Amended Claim are true, the Tribunal could not find, based on those facts, that the alleged discrimination was intentional. Specifically, even assuming all the facts pleaded are true, including the allegations that ADM made the alleged campaign contributions, that ADM and Governor Davis met privately before the Governor was elected, that ADM conducted the alleged public campaign against the continued use of MTBE, and that certain members of Congress urged that MTBE no longer be used, these facts (even taken together) could not be deemed to establish that the subject California measures were intended to discriminate against Canadian investors and Canadian-owned investments that produce and market methanol.

that the measures would benefit ethanol producers by prospectively banning MTBE.<sup>22</sup> Methanex, however, does not produce or market MTBE: it produces and markets only methanol, an ingredient used in the manufacture of MTBE. Methanex cannot, therefore, credibly allege that the measures discriminate against methanol producers and marketers. Any impact on Methanex as a result of supposed discrimination against MTBE suppliers is plainly too indirect and remote.

Specifically, Methanex's new claim of discrimination is founded on the notion that "[e]thanol, . . . an oxygenate like MTBE, is the chief competitor of MTBE and the primary beneficiary of the California MTBE ban."<sup>23</sup> However, methanol is not used as an oxygenate in gasoline and, consequently, does not compete with ethanol in the market for such oxygenates. Methanex's allegation that the measures benefit the ethanol industry therefore cannot support its allegation that the measures discriminate against Methanex and its investments, or against any other suppliers of products or services to MTBE producers. The Draft Amended Claim thus contains no credible allegations of fact that, if true, could establish that the measures discriminate against Methanex or its United States investments. Consequently, for the reasons stated in the Memorial and above, the alleged injuries are simply too indirect and remote for jurisdiction over Methanex's claims to attach.

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<sup>22</sup> Draft Amended Claim at 1 (footnote omitted) (the first sentence of Methanex's Draft Amended Claim states: Methanex "seeks to amend its NAFTA claim in order to allege intentional discrimination by the State of California to favor and protect the U.S. ethanol industry, and to ban a product – methanol-based methyl tertiary-butyl ether ('MTBE') – that has been repeatedly and stridently identified in the United States as 'foreign.'").

<sup>23</sup> *Id.* at 1.

## **II. METHANEX FAILS TO IDENTIFY ANY RIGHT VIOLATED BY THE MEASURES AT ISSUE**

In the Memorial (at 30-48), the United States demonstrated that Methanex's pleadings failed to identify any legal right, as opposed to a mere economic interest, that had been violated by the measures at issue. As demonstrated below, Methanex's new pleadings fail to cure this fatal defect in its original claims.

### **A. Methanex's Proposed Article 1102 Claim Is Inadmissible On Its Face**

Methanex's new national-treatment claim fails on its face. The sole basis for Methanex's claim is that California has enacted a future ban on MTBE in gasoline, but has not banned the use of ethanol in gasoline. Methanex, however, does not allege that it or its investments were treated differently from any producer or marketer of methanol that is an "investor of the United States" or an "investment of an investor of the United States." It fails to make this essential allegation for the simple reason that it cannot. The United States is home to one of the largest methanol industries in the world, and the California measures accord precisely the same treatment to all investors and investments in that industry, whether they be owned or controlled by investors of the United States, Canada or a third country. And Methanex does not, and cannot, credibly allege that its investments are in like circumstances with that of ethanol producers and marketers.

Article 1102 provides:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Methanex does not, and cannot, credibly allege that California accorded Methanex and its investments less favorable treatment than that which it accords, *in like circumstances*, to U.S. investors and their investments, as required by Article 1102. Specifically, Methanex cannot allege that either the Executive Order or the CaRFG3 regulations differentiate between Canadian and U.S. investors. Nor can it allege that either measure differentiates between investments in the methanol industry owned or controlled by Canadian, as opposed to U.S., investors.

The U.S. methanol industry supplies three-quarters of the U.S. methanol demand and “produces almost one-quarter of the world’s supply of methanol.”<sup>24</sup> Many of the participants in that industry are owned or controlled by U.S. investors.<sup>25</sup> The California measures treat Canadian and U.S. investors and investments alike with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The measures allow investors and investments, domestic and foreign alike, to continue to manufacture and sell methanol anywhere in the United States. And domestically-owned and foreign-owned methanol producers and marketers will be equally affected if, as Methanex predicts, gasoline marketers ultimately switch to

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<sup>24</sup> American Methanol Institute, *Methanol: North America’s Clean Fuel and Chemical Building Block*, <<http://www.methanol.org/methanol/fact/methanol.html>>; see also John Lynn, President & CEO, American Methanol Institute, Testimony before the Commerce Committee’s Subcommittee on Health and Environmental Regulations Regarding H.R. 11 (May 6, 1999) <<http://www.methanol.org/reformgas/-speeches/sp990506.html>> (“In the United States, there are 18 methanol plants located in eight states with total annual production capacity of over 2.6 billion gallons, about one-fourth of the worldwide capacity. Our industry creates over 18,000 jobs in the U.S., while generating nearly \$3 billion in economic activity each year.”).

ethanol as an oxygenate in California's gasoline, MTBE producers consequently sell less of their product and purchase less methanol, and the price of methanol on the global market declines.

Moreover, Methanex's claim that the measures discriminate in favor of ethanol and against MTBE fails on its face. Article 1102 does not obligate NAFTA Parties to treat all *products* equally; instead, it requires treatment that is not less favorable with respect to *investors* of other NAFTA Parties and their investments that are in like circumstances with their U.S. counterparts. Methanex does not allege that it or its investments are in like circumstances with producers and marketers of ethanol. It could not credibly do so. Ethanol and methanol are different products with different properties and uses, produced by industries in different sectors of the economy. Most important with respect to the measures at issue, methanol is not used as an oxygenate in gasoline, while ethanol is. Participants in the methanol and ethanol industries can hardly be viewed as in like circumstances when their products do not compete for the only relevant market – that for oxygenate gasoline additives.<sup>26</sup>

The only authority on which Methanex relies – the NAFTA Chapter Eleven award in *S.D. Myers v. Canada*, (Nov. 13, 2000) (Partial Award) – in no way advances its cause. *S.D. Myers* alleged that Canada accorded more favorable treatment to two Canadian companies than it did to *S.D. Myers*. In that case, however, the Canadian

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<sup>25</sup> For instance, Borden Chemicals, Enron, Millennium Petrochemicals, Texaco and Lyondell Methanol are all examples of U.S.-owned companies engaged in the methanol industry.

<sup>26</sup> It is also noteworthy that the Executive Order prominently directed that California agencies seek a state-wide waiver of the oxygenate requirement from the U.S. EPA. Executive Order at 1-2 ¶¶ 2, 3. If this waiver were granted, California would not require the use of any oxygenates in its gasoline – likely resulting in no benefit to either ethanol or MTBE manufacturers. It is difficult, to say the least, to reconcile this provision of the Executive Order with Methanex's suggestion that California was motivated by a desire to benefit ethanol manufacturers.

companies and S.D. Myers were all engaged in the same business: all three companies provided PCB waste disposal services.<sup>27</sup> As shown above, Methanex and its affiliates, on the one hand, and ADM and other investors and their investments that produce, market and sell ethanol, on the other, are not in like circumstances with one another. The *S.D. Myers* tribunal's finding that S.D. Myers was "in like circumstances" with the Canadian companies does not support Methanex's argument here.

Because Methanex does not, and cannot, allege that it received different treatment than investors of the United States or investments owned or controlled by investors of the United States, in like circumstances, its proposed national-treatment claim is patently baseless.

**B. Methanex's Article 1105(1) Claim Is Inadmissible On Its Face**

In the Memorial, the United States demonstrated that Methanex's Article 1105(1) claim is inadmissible because no international law standard incorporated into that article was implicated by the subject California measures. *See* Memorial at 38-48. In its subsequent pleadings, Methanex does not dispute that Article 1105(1) incorporates the international minimum standard recognized by customary international law. Nor does it contest the United States' observation that customary international law imposes no constraints on the *processes* by which States adopt such executive or legislative measures. *Compare id.* at 44-45, *with* Counter-Memorial at 8-16, *and* Draft Amended Claim at 48-65.

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<sup>27</sup> *See S.D. Myers v. Canada*, (Partial Award) at 251 (Nov. 13, 2000). The United States notes that Canada has moved to set aside this award on the ground that the tribunal inappropriately blurred the distinction between investors and investments of investors in its Article 1102 analysis. *See Attorney Gen. of Canada*



Instead, Methanex argues that the measures violate Article 1105(1) because that article creates a “heightened standard of ‘fair and equitable treatment,’” and because the measures violate a host of new substantive “principles” of international law supposedly incorporated into the Article. *See* Counter-Memorial at 8-16; Draft Amended Claim at 48-65. Methanex describes four such putative “principles”: (1) measures must not be “inequitable, unfair, or arbitrary,” and State officials must act reasonably and in good faith; (2) measures must comply with the World Trade Organization (“WTO”) requirements pursuant to which sanitary and phytosanitary measures and technical barriers to trade must be the least trade-restrictive alternative to achieve legitimate objectives and not disguised restrictions on trade; (3) elected officials must not make decisions benefiting campaign contributors; and (4) measures must not discriminate on the basis of national origin. Also, Methanex now asserts that the subject measures fail to provide its investments “full protection and security.” Draft Amended Claim at 65-66.

For the reasons that follow, Methanex’s new “principles” of international law either do not exist or have no application to the measures at issue. Nor does Methanex credibly allege that the United States breached its obligation to accord Methanex’s investments full protection and security. Its Article 1105(1) claim – whether as originally stated or as reinvented in its Draft Amended Claim – fails on its face and as a matter of law.

**1. Article 1105(1) Does Not Create A Standard Of Fair And Equitable Treatment Unknown To Customary International Law**

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*v. S.D. Myers, Inc.*, Court File No. T-225-01 (Fed. Ct. Ont. Feb. 8, 2001). The United States expresses no view here as to whether the tribunal’s analysis was correct in that regard.

The Memorial demonstrated that, based on the plain language, structure and historical context of Article 1105(1), the treatment required by the Article is that of the international minimum standard of customary international law. *See* Memorial at 39-43. Methanex's Counter-Memorial does not dispute that the text, structure and historical context of the Article support this conclusion. Instead, disregarding the terms of the NAFTA and the principle that treaties must be interpreted in accordance with applicable rules of international law (*see id.* at 12-13), Methanex contends, principally based on the writings of three academics, that the NAFTA Parties' agreement to accord "treatment in accordance with international law, including fair and equitable treatment," nevertheless reflects a standard more stringent than that of customary international law. Counter-Memorial at 8-11. Methanex's contention is without merit.

*First*, there is no room for doubt as to the import of "fair and equitable treatment" in Article 1105(1). Each of the NAFTA Parties has now confirmed in formal pleadings that phrase's content as used in the NAFTA. The United States stated its position in the Memorial. Memorial at 39-43. Mexico and Canada subsequently took the same position in their pleadings before the Supreme Court of British Columbia on Mexico's application to set aside the *Metalclad* award, stating that "the fair and equitable standard is 'explicitly subsumed under the minimum standard of customary international law.'"<sup>28</sup> The agreement among the NAFTA Parties on this point is authoritative. *See* Vienna

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<sup>28</sup> *United Mexican States v. Metalclad Corp.*, Vancouver Registry No. L002904 (Brit. Colum. S. Ct.), Petitioner's Outline of Argument (Jan. 22, 2001) at 160 ¶ 525 (quoting RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 60 (1995)), 160-66 ¶¶ 523-44; *see also* *United Mexican States v. Metalclad Corp.*, Vancouver Registry No. L002904 (Brit. Colum. S. Ct.), Outline of Argument of Intervenor Attorney General of Canada at 17 ¶ 48 ("The international minimum standard of treatment is particular and it is focused. It is a defined concept at customary international law. Article 1105 expressly adopts the minimum standard of treatment as defined by international law."); *id.* at 16-21 ¶¶ 47-64 (adopting Mexico's position).

Convention on the Law of Treaties, May 22, 1969, art. 31(3)(b), 1155 U.N.T.S. 331

(“There *shall* be taken into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”)

(emphasis added).

*Second*, Methanex’s reliance on the views of academics as to the proper interpretation of treaties other than the NAFTA is misplaced. Academics, of course, cannot create international law. International tribunals may consider the “teachings of the most highly qualified publicists of the various nations” only as a “subsidiary means for the determination of rules of law.” STATUTE OF INT’L CT. OF JUSTICE art. 38(1)(d). Academic writings may appropriately be considered for determining rules of law when they are firmly based on the practice of States – which can create international law – and are not merely a statement of personal views as to what the law might or should be.<sup>29</sup>

The writings invoked by Methanex are not based on State practice. Instead, each relates the author’s views of what he believes should be the best construction of the term “fair and equitable treatment” in certain investment treaties or in a proposed convention.<sup>30</sup> Thus, these writings are not suited for the “determination of the rules of law.” And they certainly are not persuasive in light of the accord among the three

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<sup>29</sup> See *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 38 ¶ 62 (article, in multilateral convention, proposed by International Law Commission “on an experimental basis [was] at most *de lege ferenda*, and not at all *de lege lata* or an emerging rule of customary international law. This is clearly not the sort of foundation on which . . . [the subject article] could be said to have reflected or crystallized such a rule.”).

<sup>30</sup> See KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 76-78 (1992) (presenting views on interpretation of term in U.S. bilateral investment treaties without citing any support in State practice); F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT’L L. 241, 243 (1981) (presenting views on interpretation of term “fair and equitable treatment” in British investment treaties without citing any support in State practice); Georg Schwarzenberger, *The Abs-Showcross Draft Convention on Investments Abroad: A Critical Commentary*, 14 CURRENT LEGAL PROBLEMS 213 (1961) (presenting views on interpretation of term in draft convention prepared by academics without referring to State practice).

NAFTA Parties that the views of those authors are not what the Parties agreed to in Article 1105(1). Moreover, each of these writings was based on texts that predated the NAFTA and contained provisions substantially different from Article 1105(1).<sup>31</sup> As noted in the Memorial (at 41-42), Article 1105(1) was drafted to exclude a construction of “fair and equitable treatment” along the lines of these writings.

*Third*, Methanex’s reliance on *Elettronica Sicala S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15, is equally ill founded. Unlike Article 1105(1), the treaty at issue in *ELSI* expressly prohibited “arbitrary” measures: it provided that “[t]he nationals . . . of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures . . . .” *Id.* at 72. The arguments in *ELSI* as to the meaning of that provision shed no light on the proper interpretation of the very different text of Article 1105(1).<sup>32</sup>

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<sup>31</sup> See Mann, *supra* note 30 at 251 (interpreting treaty that provided: “Investments of national or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security . . . .”; and “Each Contracting Party shall not subject nationals or companies of the other Contracting Party in its territory . . . to unreasonable measures . . . .”) (*quoting* Agreement on Investments, Dec. 3, 1980, U.K.-Phil., arts. III ¶ 2, IV ¶ 2); Schwarzenberg, *supra* note 30 at 217 (interpreting draft convention that provided: “Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures.”) (*quoting* 1959 Abs-Showcross Draft Convention on Investments Abroad); VANDEVELDE, *supra* note 30 at 76-78 (interpreting three U.S. draft 1980s bilateral investment treaties); *see id.* at A-4 p. 28 (*quoting* Sept. 1987 Draft U.S. bilateral investment treaty art. II, ¶ 2: “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures . . . investments.”); *id.* at A-3 p. 21 (*quoting* Feb. 24, 1984 draft U.S. bilateral investment treaty, art. II, ¶ 2: “Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures . . . investments.”); *id.* at A-2 p. 12 (*quoting* Jan. 21, 1983 U.S. draft bilateral investment treaty, art. II, ¶ 4: “Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and shall in no case be less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures . . . investment . . . .”).

<sup>32</sup> The ICJ’s interpretation of the treaty at issue in *ELSI* in any event provides no support for Methanex’s expansive reading of Article 1105(1)’s text. *See ELSI*, 1989 I.C.J. at 76 (“Arbitrariness is not so much

Finally, the United States respectfully submits that the recent award in *Pope & Talbot* finding that the “fair and equitable treatment” standard is “*additive* to the requirements of international law” is poorly reasoned and unpersuasive. Award of Apr. 10, 2001, at 48 ¶ 110. First, the tribunal expressly recognized that its interpretation was contrary to the plain text of Article 1105(1). *Id.* (“It is true that the language of Article 1105 suggests otherwise, since it states that the fairness elements are included within international law.”). Second, although it acknowledged that the intent of the NAFTA Parties is necessarily the touchstone of any interpretation of the treaty, *see id.* at 53-54 ¶¶ 115-116, the tribunal overlooked the fact that the three NAFTA Parties in fact agreed in their pleadings that Article 1105(1) incorporates only the international minimum standard. *See id.* at 52 n.109 (stating, erroneously, that “[n]either Mexico nor Canada has subscribed to the version of the intent of the drafters put forward by the United States”). As noted above, there is no longer any doubt as to the intent of the NAFTA Parties, and that intent does not support *Pope & Talbot*’s reasoning. *See supra* n.28 and accompanying text. Finally, that tribunal’s conclusion was based in substantial part on its view that the terms “fair and equitable treatment” in bilateral investment treaties of the United States incorporated obligations more expansive than those of customary international law. *See id.* at 49 ¶ 111 & 52-55 ¶¶ 113-118. As noted in the Memorial (at 40-41 & n.53), that view is incorrect and, in any event, misconceives the task of a

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something opposed to a rule of law, as something opposed to the rule of law. . . . It is wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”).

Chapter Eleven tribunal – which is to apply the NAFTA as the rule of decision, not different provisions in other treaties. *See* NAFTA art. 1131(1).<sup>33</sup>

For these reasons, and those stated in the Memorial, Methanex’s assertion that Article 1105(1) incorporated standards unknown to customary international law is without legal merit.

## **2. The Measures Here Implicate No Customary International Law Obligation Of “Good Faith” Or “Reasonableness”**

Methanex fails in its attempt to find in customary international law a *general* obligation that States enact “good” and “reasonable” legislation and administrative rules. *See* Draft Amended Claim at 53-56. There is no such general obligation. The authorities Methanex cites do not support any such obligation applicable to the measures at issue here.

The United States recognizes that international law can impose obligations of good faith and reasonableness in certain specific circumstances. For example, customary international law holds that “[e]very treaty in force is binding on the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties, May 22, 1969, art. 26, 1155 U.N.T.S. 331. Also, in some circumstances, States have entered into treaties that impose a reasonableness requirement with respect to specific activities. As confirmed by the annexed reply report of Harvard Law School Professor Detlev Vagts, however, there is no *general* international principle that requires all of a State’s

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<sup>33</sup> In addition, as noted above, all three NAFTA Parties agree that the award in *Metalclad Corp. v. United Mexican States* wrongly relied on norms outside of the customary international law minimum standard in applying Article 1105(1). ICSID Case No. ARB(AF)/97/1, ¶¶ 97, 99-101 (Aug. 30, 2000); *see* authorities cited *supra* note 28. For these reasons and those set forth in the Memorial, that tribunal’s sparsely reasoned discussion of the fair and equitable treatment requirement, which (along with the remainder of the

legislative or administrative rules to conform to any customary international standard of “good faith” or “reasonableness.” See Reply Expert Report of Detlev F. Vagts (“Vagts Reply Rep.”), dated April 11, 2001, ¶¶ 5-6.

Methanex cites several categories of authorities, none of which support a general obligation of reasonableness or good faith that would apply to the measures at issue here. The first category consists of decisions that merely noted and applied the principle of *pacta sunt servanda* stated above (that treaty obligations must be performed in good faith),<sup>34</sup> or involved treaty provisions that imposed an obligation of reasonableness on specified State activities.<sup>35</sup> See Draft Amended Claim at 54-55. Of course, here, neither the Executive Order nor the CaRFG3 Regulations were issued to implement treaty obligations, and nothing in the NAFTA imposes an obligation of reasonableness with respect to those measures. Thus, this category of authorities does not support a customary international law obligation of reasonableness or good faith applicable here.

The second category merely recognizes that, under customary international law, States *may* discriminate against aliens as long as that discrimination is not unreasonable (*e.g.*, granting only citizens the right to vote).<sup>36</sup> See Draft Amended Claim at 54-55.

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award) is the subject of an ongoing, judicial set-aside proceeding in British Columbia, is neither persuasive nor authoritative.

<sup>34</sup> See *Nuclear Tests II* (Austl. v. Fr.), 1974 I.C.J. 253, 267-68 ¶¶ 44, 46 (Dec. 20) (when States make binding unilateral declarations “by which their freedom of action is to be limited,” same principles of good-faith performance applicable to treaties apply); *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176, 212 (Aug. 27) (States must act reasonably and in good faith in performing customs valuation prescribed by treaty).

<sup>35</sup> See *ELSI*, 1989 I.C.J. at 72 (addressing treaty provision that “nationals . . . of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures . . . .”); ALAN O. SYKES, *PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS* 16 (1995) (discussing GATT disputes as to whether unreasonable health and safety restrictions on imported goods violated international trade agreements).

<sup>36</sup> See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 526, 531 (5<sup>th</sup> ed. 1998) (observing that “it is agreed on all hands that certain sources of inequality are admissible . . . it is not contended that the alien should have political rights in the host state as of right,” then later stating that “[t]he concept of

These authorities are inapposite here. First, as noted above, Methanex has failed credibly to allege that the subject California measures violate the prohibition of discrimination against aliens agreed to by the NAFTA Parties in the form of Article 1102. *See supra* at 18 *et seq.* Second, as noted below, no general customary international law prohibition of nationality-based discrimination is incorporated into Article 1105(1), and, therefore, customary international law principles addressing the reasonableness of discriminating against aliens in specific circumstances are irrelevant with respect to Methanex's Article 1105(1) claim. *See infra* at 33 *et seq.*

The third category consists of the NAFTA Chapter Eleven awards in *Metalclad* and *S.D. Myers*. *See* Draft Amended Claim at 53, 55-56. As noted above, all three NAFTA State Parties agree that the portion of the *Metalclad* award dealing with the fair and equitable treatment obligation was wrongly reasoned. And the statement from *S.D. Myers* cited by Methanex is vague *dicta* unsupported by any citation to authority.<sup>37</sup> Thus, *S.D. Myers* is not persuasive here.

Finally, Methanex relies on Sir Gerald Fitzmaurice's discussion of the controversial doctrine of abuse of rights in international law. *See* Draft Amended Claim at 54. Methanex fails to disclose, however, Judge Fitzmaurice's caution that the doctrine

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discrimination calls for more sophisticated treatment in order to identify unreasonable (or material) discrimination as distinct from the different treatment of non-comparable situations."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. f (1987) ("[D]iscrimination implies unreasonable distinction."); A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment*, 8 J. TRANSNAT'L L. & POL'Y 57, 69 (1998) ("Unreasonable, arbitrary, or invidious distinctions are undoubtedly prohibited by international law, and are actionable.").

<sup>37</sup> *See S.D. Myers* (Partial Award) at 66.



“has not been affirmed by the [ICJ]” and “cannot be regarded as definitely established, or as constituting an accepted principle of international law.”<sup>38</sup>

Thus, for the reasons stated in the Memorial and here, no customary international law obligation of “good faith” or “reasonableness” applies to the subject California measures. Consequently, Methanex does not credibly allege a violation of Article 1105(1).

### **3. Article 1105(1) Does Not Incorporate WTO Requirements**

There is no merit to Methanex’s startling assertion that the NAFTA adopted the WTO Technical Barriers and Sanitary and Phytosanitary Measures Agreements as investment protections subject to Chapter Eleven’s investor-State arbitration mechanism. *See* Draft Amended Claim at 58-65. Methanex’s contention is based solely on an unsupported musing in a separate opinion by Dr. Bryan Schwartz, a member of the divided panel in the *S.D. Myers* arbitration; neither of the other arbitrators in that case adopted his suggestion that WTO agreements might serve as the basis for a Chapter Eleven claim.<sup>39</sup> Methanex’s reliance on Dr. Schwartz’s statement is ill founded.

*First*, as noted above, each of the three NAFTA Parties has now formally confirmed that Article 1105(1)’s fair and equitable treatment standard “is ‘explicitly

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<sup>38</sup> SIR GERALD FITZMAURICE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE* 12 (1986).

<sup>39</sup> *See* Draft Amended Claim at 58 (quoting SEP. OP. of Dr. Bryan Schwartz) (“The interpretation and application of Article 1105 must, *I tend to think*, also take into account the letter or spirit of widely, though not universally, accepted international agreements like those in the WTO system and those typical of BITs.”) (emphasis added). Although Methanex also quotes language from the *S.D. Myers* partial award, arbitrator Edward Chiasson did not concur with that part of the award. *See S.D. Myers* (Partial Award) at 67 ¶ 267. The part of the award relied upon by Methanex does not find that WTO agreements are relevant to Article 1105(1); instead, it finds – erroneously, in the view of each of the NAFTA State Parties – that an Article 1102 violation can in some instances establish an Article 1105(1) violation. *See id.* at 66 ¶ 266.

subsumed under the minimum standard of customary international law.”<sup>40</sup> WTO agreements are not part of the customary international minimum standard of treatment. They are not, therefore, incorporated into Article 1105(1).

*Second*, there is no support – and Methanex offers none – for the notion that the WTO agreements have crystallized into customary international law. The ICJ has developed stringent tests for determining when a provision of a multilateral treaty can be considered to codify or otherwise reflect customary international law.<sup>41</sup> Methanex bears the burden of providing legal support for a contention that an obligation has become binding as a matter of customary international law.<sup>42</sup> It has not done so, and cannot do so.

*Third*, any suggestion that the WTO agreements are incorporated into Article 1105(1) as treaty obligations cannot be squared with the NAFTA’s text. In creating Chapter Eleven’s exceptional investor-State dispute settlement mechanism, the NAFTA Parties expressly identified the treaty obligations the breach of which could be submitted to arbitration. Articles 1116(1) and 1117(1) state a consent to arbitrate only claims based on a breach of either Section A of Chapter Eleven, Article 1503(2) or, under certain circumstances, Article 1502(3)(a). Most notably, Articles 1116(1) and 1117(1) do not

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<sup>40</sup> See *supra* note 28 and accompanying text.

<sup>41</sup> See generally *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 37-46 ¶¶ 60-82.

<sup>42</sup> See *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176, 200 (quoting *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 276) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 330 § 214 (6<sup>th</sup> ed. 1999) (burden on party “who relies on a custom to establish its existence and exact content”) (“c’est à [la partie] qui s’appuie sur une coutume d’en établir l’existence et la portée exacte”) (translation by counsel); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 11 (5<sup>th</sup> ed. 1998) (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.”).

contain a consent to arbitrate claims based on the NAFTA's *own*, specific provisions on technical barriers and sanitary and phytosanitary measures – Section B of Chapter 7, entitled “Sanitary and Phytosanitary Measures,” and Chapter Nine, entitled “Standards-Related Measures.”<sup>43</sup> It defies logic to suggest, as Methanex does, that the NAFTA Parties consented to arbitrate claims based on WTO agreements – which do not include an agreement analogous to NAFTA's Chapter Eleven or any investor-State dispute resolution process – when those same Parties plainly did not consent to arbitrate claims based on the NAFTA's own provisions regulating precisely the same subjects, and when those NAFTA provisions were particularly tailored to the specific needs of the three NAFTA Parties.<sup>44</sup>

Moreover, Methanex's suggestion that Article 1105(1) creates a new, private right of action for investors to challenge a breach of any treaty or customary international law obligation is manifestly absurd. Numerous treaties, many of which have either no mechanism for resolving disputes between States or highly specialized mechanisms, are in effect among the NAFTA Parties. The limited consent to arbitration granted in Chapter Eleven cannot reasonably be extended to the international law obligations embodied in those treaties. Otherwise, the NAFTA Parties would potentially be subject

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<sup>43</sup> Chapter Nine is the only chapter in Part Three of the NAFTA, entitled “Technical Barriers to Trade.”

<sup>44</sup> See North American Free Trade Agreement Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I (1993) at 89 (“Section B [of Chapter Seven] represents the first comprehensive agreement on S&P [*i.e.*, sanitary and phytosanitary] measures concluded by the United States. Before the NAFTA, rules on S&P measures had not been fully elaborated, although they are covered by the GATT . . . . Because the NAFTA negotiations involved only three countries[,], . . . the three NAFTA governments were able to tailor the NAFTA provisions to their particular needs.”), 120-21 (“Since 1980, the United States has been a party to the Agreement on Technical Barriers to Trade (‘Standards Code’) . . . . The NAFTA provisions on SRMs [*i.e.*, standards-related measures] drew both from [the Uruguay Round draft text to update the Standards Code] . . . and from the CFTA [*i.e.*, U.S.-Canadian Free Trade Agreement] . . . . Because the NAFTA negotiations involved only three countries, the NAFTA governments were able to tailor the provisions of Chapter Nine to their particular needs.”).

to a vast number of claims for monetary damages based on obligations that were not assumed with the understanding that their breach could give rise to such claims.

Thus, Methanex's assertion that the NAFTA Parties intended to create a private right of action under Chapter Eleven for alleged violations of requirements contained in WTO agreements is without legal merit.

#### **4. Other Provisions Of Chapter Eleven Address Discrimination Based On Nationality To The Exclusion Of Article 1105(1)**

Methanex's suggestion that Article 1105(1) incorporates a general customary international law prohibition on discrimination based on national origin misapprehends the role of Article 1105(1). *See* Draft Amended Claim at 57. In Chapter Eleven, the NAFTA Parties agreed to a comprehensive and specific legal regime addressing precisely when discrimination on the basis of nationality is permitted and when it is not.<sup>45</sup> As demonstrated below, this regime would be ineffective if nationality-based discrimination were a ground for an Article 1105(1) claim. Moreover, it is well established that, where States agree to such a specific, comprehensive regime of treaty obligations, "the provisions of the [treaty] will prevail in the relations between the Parties, and would take

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<sup>45</sup> *See, e.g.*, NAFTA art. 1102 (national treatment obligation); *id.* art. 1103 (most-favored-nation treatment obligation); *id.* art. 1104 (prioritizing national and most-favored-nation treatment obligations); *id.* art. 1105(2) (requiring "non-discriminatory treatment with respect to measures . . . relating to losses suffered by investments . . . owing to armed conflict or civil strife"); *id.* art. 1107 (no Party may make certain requirements that the composition of senior management and boards of directors be "of any particular nationality"); *id.* art. 1108 & annexes I-IV (providing comprehensive set of exceptions to specified prohibitions against discrimination); *id.* art. 1109(4) (providing that "a Party may prevent a transfer through the equitable, non-discriminatory and good faith application" of certain laws); *id.* art. 1110(1)(b) (permitting expropriations "on a non-discriminatory basis" and under certain other conditions); *id.* art. 1111 (permitting different treatment on basis of nationality for certain special formalities and information-gathering requirements).

precedence of any rules having a more general character, or derived from another source.”<sup>46</sup>

That the NAFTA Parties intended to exclude any general prohibition of discrimination on the basis of nationality from Article 1105(1) is apparent from the text of Chapter Eleven. Article 1108, entitled “Reservations and Exceptions,” excepts a range of measures, sectors of the economy and economic activities from the application of the prohibitions against discrimination on the basis of nationality contained in Articles 1102, 1103 and 1107. By doing so, Article 1108 expressly *permits* the NAFTA Parties to accord more favorable treatment to nationals in those sectors and engaged in those activities. Article 1108, however, contains *no* exception with respect to the application of Article 1105(1).<sup>47</sup> Consequently, if a general, customary international law prohibition against discrimination were read into Article 1105(1), then the provisions of Article 1108 exempting specific subjects from prohibitions against discrimination on nationality grounds would be wholly ineffective.<sup>48</sup> Such a result cannot be reconciled with the clearly expressed intent of the NAFTA Parties.

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<sup>46</sup> *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 24 ¶ 25; see also MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 160 (1997) (“There is considerable doctrinal support for the view that, with the express statement of a new rule in a text, the drafting body implicitly intended to exclude other, incompatible customary rules on the same subject-matter: *expressio unius est exclusio alterius*.”) (footnote omitted).

<sup>47</sup> Likewise, Article 1111 excepts from the application of Article 1102 and, in part, Article 1103, but not Article 1105(1), certain “special formalities in connection with the establishment of investments by investors of another Party” and “routine information” concerning such investments.

<sup>48</sup> See *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (rejecting construction that was “contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness.”) (collecting authorities); accord *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (“It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.”).

For these reasons, Methanex's claim of discrimination based on Article 1105(1) is baseless on its face.

**5. No Principle Of Customary International Law Prohibits Elected Officials From Making Decisions Benefiting Campaign Contributors**

Methanex contends that, in order “to enable public officials to act in good faith,” international law prohibits State officials from making decisions that could affect their pecuniary or other personal interests. Draft Amended Claim at 49. From this general “principle,” Methanex concludes that elected officials are prohibited under international law from making decisions benefiting campaign contributors. *Id.* at 50. Methanex's conclusion not only is without legal support in international or municipal law,<sup>49</sup> but also makes no sense and would lead to absurd results. As Professor Vagts concluded, there is neither any such rule nor, indeed, any “international consensus on the subject of the proper regulation of campaign finance – a subject that appears to be equally controversial in the United States and elsewhere.” *See* Vagts Reply Rep. ¶¶ 7-8.

Political campaigns in all three of the NAFTA Parties are legally financed – and were financed when the NAFTA was negotiated – at least in part, by contributions from private sources, including individuals and corporations. In the United States, for

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<sup>49</sup> None of the authorities Methanex cites involved elected officials who made decisions that benefited their campaign contributors. *See* Draft Amended Claim at 49-50. Methanex cites only three municipal cases (two British cases and one Australian case) that it asserts demonstrate that “[i]t is common to all legal systems that a person sitting in a decision-making capacity must be independent and without a pecuniary interest in the matter . . . .” *Id.* at 49-50. Although Methanex asserts that two of those cases support its contention that “[t]his requirement . . . is not limited to judicial officials, but applies to any public official sitting in a decision-making capacity,” *id.* at 50, all three cases in fact involved (and cited cases that involved) persons sitting in a judicial or quasi-judicial capacity. *Id.* at 49 (*quoting Regina v. Gough*, A.C. 646 (H.L. 1993) (involving a claim that a juror was biased)); *id.* at 50 (*quoting Webb and Hay v. The Queen*, 181 C.L.R. 41, 53 (Austl. 1994) (same) (in sentence after the passage quoted by Methanex, court makes clear that officials were exercising judicial or quasi-judicial functions.)); *id.* (*quoting Gough*, A.C. at

example, elected officials at all levels of government receive campaign contributions from private sources. Elected officials in the NAFTA Parties routinely make decisions benefiting the interests of campaign contributors. Consequently, Methanex's contention that Article 1105(1) prohibits this practice – and therefore that the NAFTA Parties intended the practice to give rise to claims for monetary damages – is simply absurd.

The United States further notes that State practice cannot be reconciled with Methanex's assertion that the Parties agreed in the NAFTA to sweeping changes in their electoral practices. The United States is unaware of any statement by any of the three Parties suggesting that the NAFTA contemplated such changes. As noted above, each of the electoral systems of the State Parties continues to permit elected officials to make decisions that affect contributors to their campaigns without any claim by a State Party that the practice violates the NAFTA. State practice thus provides no support for the existence of this so-called "principle" of international law.

#### **6. Methanex Fails Credibly To Allege A Denial Of Full Protection And Security**

In the Draft Amended Claim, Methanex asserts (for the first time) that the United States violated the full protection and security obligation in Article 1105(1) by not overturning the subject California measures. *See* Draft Amended Claim at 65-66. According to Methanex, the full protection and security requirement obligates the NAFTA Parties to "protect foreign investments from economic harm inflicted by third parties." *Id.* at 66. This breathtaking assertion not only rests on a faulty understanding of

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665-66 (citing *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, [1969] 1 Q.B.577 (regarding a decision by a rent assessment committee, *i.e.*, a quasi-judicial body))).

Article 1105(1)'s guarantee of full protection and security, but also is unsupported by any legal authority.

As noted in the Memorial, Article 1105(1) expressly references “full protection and security,” as well as “fair and equitable treatment,” as an example of the customary international law minimum standard of treatment. *See* Memorial at 39. As with the fair and equitable treatment standard, the full protection and security standard is defined by customary international law, and Article 1105(1) does not expand or otherwise modify the minimum standard of treatment under customary international law.<sup>50</sup>

Cases in which the customary international law obligation of full protection and security was found to have been breached are limited to those where a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.<sup>51</sup> This case does not resemble any of those

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<sup>50</sup> *ELSI* is instructive on this point. That decision addressed an article of a treaty of friendship, commerce and navigation that provided: “The nationals of each High Contracting Party shall receive . . . the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law.” 1989 I.C.J. at 63. Noting that the “primary standard laid down by Article V is the ‘full protection and security required by international law,’” the ICJ chamber held: “in short the ‘protection and security’ must conform to the minimum international standard.” *Id.* at 66.

<sup>51</sup> *See, e.g., American Manufacturing & Trading, Inc. v. Zaire*, 36 I.L.M. 1531 (1997) (failure to prevent destruction and looting of property constituted violation of protection and security obligation); *Asian Agricultural Products Ltd. v. Sri Lanka*, 30 I.L.M. 577 (1991) (destruction of claimant’s property violated full protection and security obligation); *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); *Chapman v. United Mexican States* (U.S. v. Mex.), 4 R.I.A.A. (Mex.-U.S. Gen. Cl. Comm’n 1930) (lack of protection found where claimant was shot and seriously wounded); *H.G. Venable* (U.S. v. Mex.), 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm’n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Réclamation 53 de Melilla - Ziat, Ben Kiran)* (Spain v. G.B.), 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant’s store); *see also, e.g.,* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 183 (1965) (which significantly is not included in the part of the RESTATEMENT dealing with economic injuries) cmt. *a* (“A state is not an insurer of an alien’s safety in its territory, but a state is liable for failure, intentional or negligent, to maintain a police system adequate for the protection of aliens . . .”), cmt. *c* (“The rule of this Section does not apply to injurious conduct of a private nature, such as ordinary negligence, breach of contract or patent infringement. It is concerned only with conduct that is of a criminal nature or that the police are normally concerned with preventing in the interest of preserving public order.”); Article 7(1) of



international decisions in the slightest – neither physical harm or invasion, nor acts of a criminal nature are alleged. Therefore, Methanex’s full protection and security claim is inadmissible on its face.

Indeed, if the full protection and security requirement were to extend to an obligation to “protect foreign investments from economic harm inflicted by third parties,” Draft Amended Claim at 66, Article 1105(1) would constitute a very substantial enlargement of that requirement as it has been recognized under customary international law. Such an interpretation of Article 1105(1) would violate the principle that general international law must be taken into account in interpreting treaty provisions. *See supra* note 16 and accompanying text (*quoting Samiaggi*, 10 R.I.A.A. 499, 521 (Mixed Italy-Venez. Comm’n of 1903)). As the *AAPL* tribunal stated in rejecting a claimant’s construction of full protection and security in a bilateral investment treaty:

[P]roper interpretation has to take into account the realization of the Treaty’s general spirit and objectives, which is clearly in the present case the encouragement of investments through securing an adequate environment of legal protection. But, in the absence of travaux préparatoires in the proper sense, it would be almost impossible to ascertain whether Sri Lanka and the United Kingdom had contemplated during their negotiations the necessity of disregarding the common habitual pattern adopted by previous treaties, and to establish a “strict liability” in favour of the foreign investor as one of the objectives of their treaty protection. Equally, none among the authors referred to by the Parties claimed in his commentary that the Sri Lanka/U.K. Treaty or similar Bilateral Investment Treaties had the effect of increasing the

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the *Responsibility of the State for injuries caused in its territory to the person or property of aliens*: Revised draft, reprinted in F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 129, 130 (1974) (“The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.”); *cf.* Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT’L L., 501, 510 n.28 (1998) (“It does not appear . . . that any BIT party thus far has claimed that a host state’s failure to protect intellectual property rights violated” the full protection and security obligation.).

customary international law standards of protection to the extent of imposing “strict liability” on the host State in cases where the investment suffers losses due to property destruction.

50 I.L.M. at 601. For similar reasons, this Tribunal should reject Methanex’s invitation to construe the duty of full protection and security to extend beyond the minimum standard under customary international law.

**C. Methanex Fails To Identify An Investment That Would Give This Tribunal Jurisdiction To Entertain A Claim Under Article 1110**

Methanex’s Draft Amended Claim and Counter-Memorial echo its original pleadings in failing to identify any “investment” under Chapter Eleven that allegedly was expropriated. Methanex offers up two categories of “investments” under the heading of its Article 1110 claim: (1) the enterprises, Methanex US and Methanex Fortier, and (2) several intangibles that it, at various times, describes as goodwill, market share, market access, operations and customer base.<sup>52</sup> Neither category supports jurisdiction over Methanex’s Article 1110 claim.

As a preliminary matter, Methanex’s assertion that Methanex Fortier and Methanex US are enterprises and therefore “investments” misses the point. Of course those enterprises are “investments.” Methanex, however, does not allege that California actually or constructively took either of those enterprises away from it – nor could it credibly so allege.<sup>53</sup> Any suggestion that the Claimant, Methanex US or Methanex Fortier has been expropriated would be absurd on its face.

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<sup>52</sup> See, e.g., Counter-Memorial at 17 (“market shares, operations, and goodwill”); Draft Amended Claim at 69 (“[m]arket share, market access, and goodwill”); Reply at 13 ¶ 68 (“customers . . . known in law under the general heading of goodwill.”).

<sup>53</sup> For example, eight months after issuance of the Executive Order, Methanex announced that it had purchased from its joint venture partner the remaining 30% ownership interest in Methanex Fortier. See

Instead, Methanex avers that California took certain supposed assets belonging to it and those enterprises – namely, their “[m]arket share, market access and goodwill.” Draft Amended Claim at 69; *see also* Reply at 13 ¶ 68; Statement of Claim at 11 ¶ 35. As the United States demonstrated in the Memorial, however, attributes such as market share, customer base and goodwill do not constitute “investments” within the meaning of Chapter Eleven, and are, thus, not protected by Article 1110. Methanex does not even attempt to address the international legal authorities cited by the United States establishing that neither goodwill, customer base nor the maintenance of a certain rate of profit is, by itself, a property right capable of being expropriated. *See* Memorial at 34-37 (citing *Oscar Chinn* (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 88 (Dec. 12); *SA Biovilac NV v. European Economic Comm’t’y*, [1984] E.C.R. 4057, at IV(A)(3) (1984); *Kügele v. Polish State* (Germ. v. Pol.), *reprinted in* ANN. DIG. 1931/1932, at 69 (Upper Silesian Arbitral Trib. 1932); GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961); Rudolf L. Bindschedler, *La protection de la propriété privée en droit international public*, 90 R.C.A.D.I. 179, 223-24 (1956)). Instead, Methanex relies exclusively on two recent Chapter Eleven awards. Neither award, however, supports Methanex’s position. Furthermore, to the extent that their analyses deviate from well-established international legal authority, this Tribunal should decline to follow those decisions.

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Methanex News Release, Nov. 19, 1999 <available at <http://www.methanex.com/investorcentre/newsreleases/fortier.pdf>>. It would strain credulity to believe that any investor would seek to purchase a substantial ownership interest in an enterprise after that enterprise had been expropriated by the State. Similarly, since the Executive Order was issued, Methanex has reported continually increasing revenues and profits for the market segments served by Methanex US – again, an undisputed fact that cannot credibly be reconciled with any suggestion that Methanex US was expropriated in March 1999.

Methanex cites *Pope & Talbot* for the proposition that market share is an investment capable of being expropriated. See Counter-Memorial at 18-19. *Pope & Talbot*, however, involved a claim that an alleged denial of market *access* resulted in an expropriation of an enterprise; it did not involve a claim for a decline in market share. Pope & Talbot claimed that Canada's quota system for exports of softwood lumber into the United States denied its Canadian affiliate access to the U.S. market. The tribunal did not even address the question of whether market *share* or the maintenance of a certain rate of profit was a property right capable of being expropriated.<sup>54</sup>

In any event, market access is not at issue here. Although Methanex uses the term "market access," it nowhere explains how its or its U.S. investments' market access is being impeded. In fact, neither Methanex, Methanex US nor Methanex Fortier is being denied access to the U.S. or Canadian markets. All three companies may sell the only product that they produce and market – methanol – anywhere in the United States, including California. The *Pope & Talbot* award thus provides no support for Methanex's Article 1110 claim.

Furthermore, contrary to Methanex's assertion, the *S.D. Myers* tribunal did not determine that the investment's market share constituted a property right. With respect to that argument, the tribunal noted that "[i]t is not necessary to address these matters in this context and the Tribunal does not do so."<sup>55</sup> In addition, the tribunal merely noted in

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<sup>54</sup> *Pope & Talbot v. Canada* (June 26, 2000) (Interim Award). While the tribunal, in its summary, stated that the investment's access to the U.S. market was a property right subject to protection under Article 1110, its analysis makes clear that the underlying issue was whether, as a result of the denial of market access, the enterprise had been expropriated, and not whether there had been an expropriation of market access itself. See *id.* at ¶¶ 96, 98, 100-01. Because market access is not implicated in this case, the United States expresses no views as to the correctness of the *Pope & Talbot* tribunal's determination in that regard.

<sup>55</sup> *S.D. Myers, Inc. v. Canada* (Nov. 13, 2000) (Partial Award) 57 ¶ 232.

*dictum* that “in legal theory, rights other than property rights may be expropriated,” before it determined that “this is not an ‘expropriation’ case.”<sup>56</sup> In addition to being *dictum*, the tribunal neither cited supporting authority nor acknowledged the substantial authorities to the contrary. Dr. Schwartz’s unsupported rumination to similar effect is equally unpersuasive.<sup>57</sup>

Finally, Methanex’s reliance on dictionary definitions for the proposition that goodwill and customer base are intangibles “routinely considered when appraising a business” is beside the point. Counter-Memorial at 18. The United States agrees that under Article 1110 an appraiser may properly consider all appropriate attributes of an expropriated enterprise, including intangibles such as goodwill, customer base and the number of advanced degrees held by the enterprise’s employees. *See* Memorial at 36 n.46. Attributes, however, are not necessarily property. Goodwill and customer base, by themselves, cannot be bought, sold, transferred or expropriated any more than can the education level of the enterprise’s employees. And while such intangibles can certainly be the fruits of an investment, they cannot in themselves be considered investments in any sense meaningful under Articles 1139 and 1110. There is thus no occasion to examine intangibles such as these unless the enterprise or some other property interest constituting an investment is alleged to have been taken.

In short, Methanex has not credibly alleged that Methanex Fortier or Methanex US has been expropriated. Because Methanex claims only that it and its U.S. investments have lost some of their goodwill, customer base and market share as a result

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<sup>56</sup> *Id.* at 69 ¶ 281, 71 ¶ 288.

of the measures – none of which, as shown here and in the Memorial, constitute a *property right* or an *investment* as defined by the NAFTA – its Article 1110 claim is inadmissible.

### **III. THE SUBJECT MEASURES DO NOT “RELATE TO” METHANEX OR ITS INVESTMENTS**

In the Memorial, the United States demonstrated that the subject measures do not “relate to” Methanex or its investments – as required by Article 1101(1) – because there is no legally significant connection between those measures and Methanex or its investments. *See* Memorial at 48-50.

In response, Methanex asserts that regardless of whether a legally significant connection exists, a measure “relates to” an investor or investment simply if it “affects” the investor or investment, no matter how attenuated that effect may be. *See* Counter-Memorial at 46-52. To support this contention, Methanex relies principally on the opinions of two NAFTA arbitral tribunals, certain dictionary definitions of the word “relate” and the “‘context’ and ‘purpose’ of NAFTA.” *Id.* Methanex’s contention that the subject California measures “relate to” it or its investments must fail.

*First*, contrary to Methanex’s assertion, the United States did not argue that “[m]easures of general applicability . . . aimed at the protection of human health and the environment cannot satisfy the ‘relating to’ requirement of Article 1101(1) because they have no ‘legally significant connection’ to investors or investments.” Counter-Memorial at 46 (internal quotation omitted). Nor did the United States suggest that Article 1101(1)

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<sup>57</sup> *S.D. Myers, Inc. v. Canada* (Nov. 12, 2000) (SEP. OP., Schwartz) ¶ 218 ) (“*It might be argued that the efforts of S.D. Myers and its affiliates in Canada produced a kind of property interest known in law as ‘goodwill.’*”) (emphasis added).

creates an exception from Chapter Eleven for such measures. *See* Memorial at 48-49.

Rather, the United States argued that given the great number of measures of general applicability (such as the subject California measures), the only reasonable interpretation of “relating to” is that there must be a legally significant connection between the complained of measures and the specific investor who is the claimant, or its investments. *Id.*

*Second*, citing *S.D. Myers* and *Pope & Talbot*, Methanex incorrectly asserts that the United States’ argument “is directly contradicted by all applicable NAFTA Chapter 11 precedent.” Counter-Memorial at 48. However, the majority in *S.D. Myers* simply found on the facts that “the requirement that the import ban be ‘in relation’ to SDMI and its investment in Canada is easily satisfied,” given that the measure “was raised to address specifically the operations of SDMI and its investment.”<sup>58</sup> *S.D. Myers*, Partial Award at 58, ¶ 234. Here, in contrast, neither Methanex nor its investments are directly or even indirectly the subject of the measures at issue. And the *Pope & Talbot* tribunal merely rejected the test proffered by Canada “that a measure can only relate to an investment if it is primarily directed at that investment,” *Pope & Talbot*, at 14, ¶ 34 (Jan. 26, 2000 Award), a test that the United States is not advancing here.<sup>59</sup> Consequently, the

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<sup>58</sup> In *S.D. Myers*, the United States investor and its U.S.-owned investment in Canada sought to import into the United States PCB waste and to dispose of that waste in the United States; the Canadian measures at issue in *S.D. Myers* banned the commercial export of PCB waste for disposal. *S.D. Myers*, Partial Award at 15-27, ¶¶ 88-128.

<sup>59</sup> In *Pope & Talbot*, the U.S.-owned investment in Canada was a wood products company that manufactured and sold softwood lumber; the Canadian measures limited and placed conditions on the export of certain softwood lumber products, including those of the U.S.-owned investment. *Pope & Talbot*, at 2-4, ¶¶ 1-10 (Jan. 26, 2000 Award). Unlike Methanex and its investments, *Pope & Talbot*’s U.S.-owned investment was the direct subject of the measures at issue in that case.

decisions in *S.D. Myers* and *Pope & Talbot* are not relevant to the United States' argument here.<sup>60</sup>

*Third*, the dictionary definitions on which Methanex relies do not support its contention that a measure "relates to" investors or investments merely because it "affects" them. Those definitions show only that, in isolation, the term "relate" has several meanings, the common element being that for one thing to "relate to" another there must be a "connection" or "link" between them. None of those definitions, however, provides guidance as to the degree of the connection or link required for a measure to be deemed to "relate to" a foreign investor or foreign-owned investment for the purposes of Article 1101(1), which, as noted above, sets forth the scope and coverage of Chapter Eleven.

*Fourth*, the context of Article 1101(1) and purposes of the NAFTA also do not support Methanex's interpretation of "relating to." Methanex asserts that NAFTA's purposes of substantially increasing cross-border investment opportunities and creating effective procedures for NAFTA's implementation, including the resolution of disputes, dictate that "relating to" be interpreted to signify any connection between a measure and an investor or investment, no matter how tenuous. This interpretation of "relating to" ignores Article 1101(1)'s context: that of a chapter containing a waiver of sovereign immunity that cannot be interpreted expansively. *See supra* n.5; Memorial at 13-14; 48-50.

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<sup>60</sup> The United States notes that in a separate opinion one of the *S.D. Myers* arbitrators disagreed with the notion that measures that only "incidentally" or "indirectly" affect foreign investors or foreign-owned investments do not "relate to" those investors or investments. *S.D. Myers*, Dr. Schwartz Separate Opinion at 16-17, ¶¶ 54, 56. To the extent this separate opinion suggests that a legally significant connection exists *merely if* a measure has an "incidental" or "indirect" effect on an investor or investment, the United States submits that the opinion should not be followed for the reasons stated here and in the Memorial (at 48-50).



Thus, Methanex fails to demonstrate that “relate to” means merely “affect.” Nor does Methanex demonstrate any legally significant connection between the subject California measures and it or its investments. Consequently, and for the reasons stated in the Memorial, this Tribunal lacks jurisdiction over Methanex’s claims because they do not “relate to” it or its investments as required by Article 1101(1).

#### **IV. METHANEX HAS NOT INCURRED COGNIZABLE LOSS OR DAMAGE**

##### **A. Methanex Cannot Suffer Cognizable Loss Or Damage Prior To December 31, 2002\_\_**

The Memorial demonstrated that, under established principles of customary international law, no claim for expropriation may be made until the property at issue has actually been taken: the mere enactment of an enabling law does not constitute an expropriation. *See* Memorial at 57-60. The Memorial further established that the use of MTBE in California’s gasoline is currently permitted by law and will continue to be until December 31, 2002. Because the MTBE ban in California has not gone into effect and will not do so until 2003, Methanex cannot demonstrate the loss or damage that is a jurisdictional prerequisite to the filing of a Chapter Eleven claim.<sup>61</sup>

In response, Methanex does not dispute that, under customary international law, an expropriation cannot result from the mere passage of non-self-executing legislation. Nor does it dispute that the ban on MTBE’s use in California gasoline will go into effect only at the end of 2002. Instead, it vaguely avers that it has suffered a loss and relies on two inapposite authorities. Its contentions are without merit.

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<sup>61</sup> Methanex does not suggest that its proposed addition of a national-treatment claim here would change this analysis.

*First*, Methanex's reliance on the opinion in *Applicability of the Obligation to Arbitrate Under Section 21 of the UN Headquarters Agreement* is misplaced. 1988 I.C.J. 12 (Apr. 26). The principal issue in that case was whether a dispute existed between the United Nations and the United States concerning the interpretation or application of a treaty. *See id.* at 27 ¶ 34. In order to submit a claim to arbitration under Articles 1116 and 1117 of the NAFTA, however, a claimant must plead not that a dispute exists, but that *the investor has incurred loss or damage by reason of, or arising out of*, a breach of an obligation under Section A (or other provisions irrelevant here). The arbitration clause at issue in the *Headquarters Agreement* contained no such requirement of breach and loss. 1988 I.C.J. at 14-15 ¶ 7. Thus, the United Nations did not need to allege that it suffered legal injury by reason of the United States' alleged breach of that agreement; the United Nations needed to allege only that a dispute existed.

The *Headquarters Agreement* case does not support Methanex in any event. In that case, the United States notified the Palestine Liberation Organization that maintenance of its mission was unlawful under a U.S. anti-terrorism act and sued for compliance in a national court in New York. *See id.* at 30 ¶ 43. Thus, in that case, the law not only had gone into effect, but an enforcement action had been initiated. By contrast, the ban of MTBE's use in California's gasoline has not yet gone into effect, and California has not taken any enforcement action against Methanex or its U.S. affiliates.

*Second*, the *Ethyl* decision on which Methanex relies merely addressed the question of when a proposed measure becomes a final measure; it did not address the question of when a claimant has suffered a loss or injury under the NAFTA as a consequence of a measure. In fact, at the time of the *Ethyl* decision, the MMT Act,

prohibiting the interprovincial trade in, and importation of, MMT, had been in effect for nearly two years.<sup>62</sup>

*Finally*, Methanex's vague assertion of "immediate damage" from the California measures misses the mark. Counter-Memorial at 30-31. Under the uncontested authorities recited in the Memorial, those supposed damages are not legally cognizable absent entry into force of the ban.<sup>63</sup> *See* Memorial at 57-62.

### **B. Neither The Bill Nor The Executive Order Banned MTBE**

Methanex contends at length that the Executive Order is, in fact, a "measure" within the meaning of the NAFTA. The United States, however, has never disputed that the Executive Order is an actual, and not merely a proposed, "measure." While the Executive Order indisputably is a measure, it is equally indisputable that it is not a measure that bans the use of MTBE in California's gasoline. Methanex's arguments to the contrary are without merit.

*First*, Methanex does not attempt to address the principal argument set forth in the Memorial: the Executive Order did not have the legal effect of banning MTBE in

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<sup>62</sup> By contrast, here, the Oxygenated Fuels Association ("OFA") has challenged the legality of the CaRFG3 regulations. *See Oxygenated Fuels Ass'n v. Davis*, Case No. Civ.S 01-0156 (E.D. Cal. Jan. 23, 2001). If the OFA prevails, the CaRFG3 regulations may not go into effect. The existence of this suit highlights the premature nature of Methanex's claim. Exercising jurisdiction over Methanex's Chapter Eleven claim would have dire consequences: it would permit the possibility that a State may incur international responsibility by adopting a law even where the challenged law may later be rescinded before ever becoming effective.

<sup>63</sup> Methanex's contention that application of the customary international law principle identified in the Memorial would place it in an "untenable position" vis-à-vis the limitations period is mistaken. As the NAFTA makes clear, an investor has three years to submit a claim to arbitration from the time it knows or should have known of the breach and that it has incurred loss or damage. *See* NAFTA arts. 1116(2) & 1117(2). To the extent Methanex contends that an MTBE ban will cause it damage, the time for it to file a claim would not begin to run until any ban alleged to be a breach of Chapter Eleven became effective and Methanex or its U.S. affiliates incurred loss or damage by reason of, or arising out of, that ban. *See, e.g.*, Memorial at 57-60.

California's gasoline and did not affect the legal rights of any private parties. *See* Memorial at 53-54, n.71.

*Second*, the *Ethyl* decision relied on by Methanex lends no support to its argument. In *Ethyl*, the challenged law received Royal Assent eleven days after the statement of claim was submitted. The tribunal did not dismiss the claim, however, because the claimant could have submitted another claim based upon *that same measure*; dismissing the claim would have simply prolonged resolution of the dispute. Here, the passage of time cannot cure the jurisdictional defect because the measures Methanex challenged in its original claims – the Bill and the Executive Order – can never give rise to a cognizable Chapter Eleven claim.

*Finally*, Methanex's reliance on the international law rule recognizing ongoing or collectively wrongful actions is misplaced. The United States agrees that under international law breaches may be continuous and claimants, under certain circumstances, may bring actions based on a series of measures. NAFTA Chapter Eleven, however, only permits claimants to bring claims for measures that allegedly breach a Section A obligation. The United States' objection is simple: if Methanex alleges that banning MTBE in California's gasoline violates Chapter Eleven, Methanex must challenge the measure that bans MTBE. The CaRFG3 regulations, and not the Executive Order, do that. Methanex, therefore, suffered no loss or damage by reason of, or arising out of, the passage of the Executive Order, and its claim challenging the Executive Order as a measure that violates Chapter Eleven should be dismissed.<sup>64</sup>

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<sup>64</sup> For this reason, Methanex's citations to *Pope & Talbot v. Canada* (Aug. 7, 2000) (Motion on Super Fee) and *Metalclad*, (Award) ¶ 66 (Aug. 30, 2000) are wide of the mark. In both cases, at the time the claims were filed, the alleged breach had already occurred. *See Pope & Talbot* (Softwood Lumber Agreement

**V. ARTICLE 1116 GRANTS NO JURISDICTION OVER CLAIMS FOR INJURIES ALLEGEDLY SUFFERED BY AN ENTERPRISE**

Methanex has submitted this claim under Article 1116 of the NAFTA, rather than under Article 1117. It is common ground that a primary function of Article 1117 is to provide a remedy for injuries to certain enterprises that would otherwise be barred from bringing a claim by the customary international law rule prohibiting claimants from filing international claims against their own governments. *See* Memorial at 68; Counter-Memorial at 39-40. The parties also agree that customary international law generally prohibits shareholders from recovering for injuries suffered by a corporation – the so-called *Barcelona Traction* rule. *See* Memorial at 65-67; Counter-Memorial at 40.

Where the parties part company is on the relationship between the *Barcelona Traction* rule and Articles 1116 and 1117. Methanex contends that Article 1116 silently derogates from the *Barcelona Traction* rule and Article 1117 provides an optional procedure for investors who prefer that any favorable award be paid to their enterprises rather than to themselves. *See* Counter-Memorial at 41. The United States contends that each Article serves a distinct and non-duplicative function: Article 1117 ensures appropriate relief for injuries suffered by a domestic corporation, while Article 1116, consistent with *Barcelona Traction*, enables shareholders to seek relief for injuries that are direct but not derivative. *See* Memorial at 62, 68. For the reasons that follow, the United States' interpretation is the correct one.

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was being implemented by Canada at time investor filed claim); *Metalclad* (injunction enjoining investor from operating landfill issued before investor filed claim).

*First*, nothing in the text of Article 1116 suggests an intent to derogate from the *Barcelona Traction* rule. Methanex’s argument for derogation is based on the mere fact that the Article provides investors a right to submit claims to arbitration and is *silent* about the type of claims that may be submitted. *See* Counter-Memorial at 41. More than silence, however, is required to derogate from an established principle of international law such as this.<sup>65</sup> Indeed, the compromissory clause in *Barcelona Traction* similarly gave the claimant a right to submit claims and was similarly silent – yet the International Court of Justice found the rule to apply and require dismissal.<sup>66</sup>

*Second*, Methanex’s principal argument for Articles 1116 and 1117 serving overlapping and duplicative functions – that a “huge and inexplicable coverage gap” would otherwise result – is based on a curious misapprehension of the concept of a derivative injury. A “derivative injury,” as the term is used in *Barcelona Traction*’s context, necessarily presumes the existence of a corporation that has suffered the primary injury.<sup>67</sup> Where an investor suffers loss to its investment and that investment is *not* an enterprise or held by an enterprise, the *Barcelona Traction* rule does not apply and Article 1116 provides a remedy. By contrast, where the injury is to an enterprise or an asset held by that enterprise, the harm to the investor is generally derivative of that to the enterprise and *Barcelona Traction* precludes a shareholder claim. Article 1117, but not

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<sup>65</sup> *See supra* note 16 and accompanying text.

<sup>66</sup> *See Barcelona Traction, Light & Power Co. (Belg. v. Sp.)*, 1964 I.C.J. 6, 27 (July 24) (treaty parties agreed to “adjudication of all disputes between the parties, involving a disagreement about their legal rights”).

<sup>67</sup> *See, e.g.*, BLACK’S LAW DICTIONARY 443 (6<sup>th</sup> ed. 1990) (defining “derivative action” as a “suit by a shareholder to enforce a corporate cause of action. . . . An action is a derivative action when the action is based upon a primary right of the corporation, but is asserted on its behalf by the stockholder because of the corporation’s failure, deliberate or otherwise, to act upon the primary right.”).

Article 1116, is available to remedy any violation of Chapter Eleven in such a case. The two Articles are thus complementary but not duplicative. There is no “coverage gap.”

*Third*, accepting Methanex’s view that the two Articles provide overlapping coverage for injuries to enterprise-investments would produce undesirable results. Allowing a shareholder to recover in its own right under Article 1116 for an injury to the corporation would effectively strip away a corporate asset – the claim – to the detriment of others with a fair interest in that asset, such as creditors of the corporation. The NAFTA clearly does not contemplate such a result.<sup>68</sup> Indeed, international tribunals have rejected shareholder claims in part because of the difficulty in determining what relief can fairly be granted in light of potential claims by creditors and other interested parties.<sup>69</sup>

*Finally*, Methanex fails to offer any support for the remarkable proposition that this Tribunal has jurisdiction over a claim for losses allegedly suffered by it directly and not in its capacity as an investor in the United States, but as a participant in the global methanol market. *See* Counter-Memorial at 45 (“[T]he measures at issue have directly harmed business that [Methanex] conducts outside of the United States.”). To have standing under Article 1116, however, it is not sufficient for Methanex to allege that it suffered an injury as a result of its participation in the global methanol market: that injury must have been suffered in Methanex’s capacity as an investor in the United

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<sup>68</sup> *See* NAFTA art. 1135(2)(c) (requiring that any award to an investor on behalf of an enterprise under Article 1117 “provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.”).

<sup>69</sup> *See, e.g.,* Eduardo Jiménez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 Phil. Int’l L.J. 71, 77, 78 (1965) (“[U]ntil the social creditors, who in all legal regimes have priority with respect to shareholders, have been paid or their credits determined and guaranteed, the extent of the damage suffered by the shareholder as such cannot be measured and it is, therefore, not only a contingent but also an undeterminate loss or damage.”).

States. None of Methanex's claimed direct injuries are connected in any way to its role as an investor. These alleged losses thus provide no support for Methanex's standing under Article 1116.<sup>70</sup>

Here, Methanex's investments in the United States, Methanex US and Methanex Fortier, are both enterprises. Any injuries suffered by Methanex as a result of the treatment of Methanex US and Methanex Fortier by the United States are thus necessarily derivative injuries. Methanex therefore has no standing to submit an Article 1116 claim for any of those alleged losses.<sup>71</sup>

## **VI. METHANEX HAS FAILED TO SUBMIT WAIVERS REQUIRED TO FORM AN AGREEMENT TO ARBITRATE THIS CLAIM**

Methanex, inexplicably, continues to fail to conform to the simple requirements of Article 1121 – despite the many months since the United States first pointed out the deficiencies in the waivers provided, and despite the United States' consent to the uninterrupted continuation of these proceedings in the event that proper waivers are provided. *See* Memorial at 77-78. Rather than offer authorized waivers that track the plain requirements of Article 1121, Methanex offers meritless arguments in support of its original, facially inadequate waivers.

*First*, Methanex's observation that a corporate subsidiary may validly ratify a parent corporation's previous unauthorized act is beside the point. *See* Counter-

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<sup>70</sup> The United States does not suggest that an investor may never recover for losses suffered by it outside of the territory of the respondent NAFTA Party. It does contend, however, that the injury must be suffered by the investor in its capacity as an investor in the respondent NAFTA Party.

<sup>71</sup> Methanex's reliance on *S.D. Myers* and *Pope & Talbot* is misplaced. The distinction between Articles 1116 and 1117 was neither raised by the parties nor addressed by the tribunals in those arbitrations. Those awards are, therefore, not instructive. Methanex's suggestion that its proposed addition of an Article 1117



Memorial at 52. The United States does not dispute that the laws of Delaware and Texas permit such ratification. The problem here – which Methanex does not contest – is that the consents Methanex provided do not conform to the requirements of Article 1121 because those consents only waived rights with respect to this arbitration, and not, as is required, with respect to the measures. *See* Memorial at 76.

*Second*, Methanex’s reliance on the so-called “Harmac” order by the *Pope & Talbot* tribunal is misplaced as well. *See* Counter-Memorial at 53-54. The United States respectfully submits that the *Pope & Talbot* tribunal’s invocation of a “constructive waiver” by the claimant was wrong. The NAFTA Parties conditioned their consent to arbitration on an explicit, written waiver. *See* NAFTA art. 1121(3). A Chapter Eleven tribunal has no authority to rewrite the terms of the NAFTA setting forth the Parties’ offer to submit to arbitration. Moreover, a primary purpose of Article 1121 waivers is to insulate the respondent Party from duplicative litigation in national courts. It is unclear, however, that a national court would consider itself bound, in determining whether to exercise its own jurisdiction, by an arbitral tribunal’s finding that a claimant “constructively waived” its right to seek relief from that court. The *Pope & Talbot* tribunal’s approach thus inappropriately deprives the respondent Party of the unequivocal, written waiver that was the benefit of the bargain it insisted upon as a condition to its agreement to submit to arbitration.

For these reasons and those stated in the Memorial – and to ensure that an enforceable award issues from these proceedings – until Methanex meets this simple

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claim moots the United States’ objection is similarly misplaced, for the addition of an Article 1117 claim cannot remedy the defective claim under Article 1116, which Methanex has not offered to withdraw.

precondition, the United States respectfully submits that the Tribunal lacks jurisdiction over Methanex's claims, and has no alternative but to dismiss them.

### **DISCRETIONARY GROUNDS FOR DISALLOWING THE AMENDMENT**

As demonstrated above, Methanex should be denied permission to amend in accordance with Article 20 of the UNCITRAL Arbitration Rules because its proposed amended claims are outside of this Tribunal's jurisdiction and patently baseless, rendering them inadmissible. In addition to its failure to state claims that are within the Tribunal's jurisdiction or admissible under the NAFTA, Methanex's proposed amendment is "inappropriate . . . having regard to the delay in making it or prejudice to the other party or any other circumstances." UNCITRAL Arbitration Rules art. 20. For the reasons that follow, the Tribunal should exercise its discretion to disallow the claims on these grounds as well.

*First*, what Methanex characterizes as an "amendment" is actually an entirely new claim. The "amendment" is based on both an entirely new measure (the CaRFG3 Regulations) and new allegations of fact not pled in the Statement of Claim: notably, ADM's business practices and contributions to candidate Davis's campaign for Governor – subjects not even mentioned in the Statement of Claim.

The legal theory for recovery based on these additional allegations is new as well. The linchpin of Methanex's Draft Amended Claim is its claim of discrimination on the basis of national origin. The Statement of Claim, however, articulated no such theory. In addition, although both the Statement of Claim and Draft Amended Claim allege a

violation of Article 1105(1), the legal basis for that violation is substantially different in the Draft Amended Claim.

International tribunals applying the UNCITRAL Arbitration Rules have disallowed amendments, such as these, that assert a new claim raising new factual and legal issues. *See, e.g., Buckamier v. Iran*, 28 Iran-U.S. Cl. Trib. Rep. 53, 59-60 (1992); *TME Int'l, Inc. v. Iran*, 24 Iran-U.S. Cl. Trib. Rep. 121, 131 (1990); *Arthur Young & Co. v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 245, 253-54 (1987). Here, Methanex acknowledges that its proposed “amendment” would fundamentally change the nature of its claim. *See* Claimant Methanex Corporation’s Request to Extend or Suspend the Current Jurisdictional Schedule, dated December 22, 2000, at 6 (“[T]he requested amendments will substantially change the original claim. Moreover, these changes will completely alter the legal standards applicable to some of the United States’ jurisdictional objections . . . .”). Because Methanex seeks to submit a new claim based on new factual allegations and new legal theories in the guise of an amendment, the Tribunal should disallow the proposed “amendment,” on this ground alone.

*Second*, Methanex should be denied permission to amend its claim because it has unduly delayed in submitting its proposed amendment, and the United States would be prejudiced were Methanex granted leave to amend. Where there has been inexcusable delay in submitting amendments, tribunals had deemed such amendments to be inappropriate, especially when the parties had already submitted written legal arguments. *See, e.g., Arthur Young*, 17 Iran-U.S. Cl. Trib. Rep. at 253-54.

Methanex has offered no justification for having waited fifteen months after the filing of its Statement of Claim to submit a proposed amendment adding an Article 1102

claim and substantially revising its Article 1105(1) claim. Despite repeatedly proclaiming that it only “discovered” information relating to its new claims in the late fall of 2000, Methanex has never explained precisely when it discovered this new information and why the information was not known to it at least as of the time it filed its Statement of Claim, if not earlier. It is indisputable that the bulk of the new averments in Methanex’s Draft Amended Claim are based on allegations that have been publicly reported and available for years.<sup>72</sup> Certainly, the reported information was sufficient to have charged Methanex with inquiry notice. Given Methanex’s unjustifiable delay in seeking to amend, its request should be denied to avoid prejudice to the United States.

The United States filed its Statement of Defense and Reply more than eight months ago based on the claims in the Statement of Claim. In November 2000, the United States filed its Memorial on Jurisdiction and Admissibility after having outlined those objections in the Statement of Defense. It was only one week after receiving the United States’ Memorial that Methanex decided to “amend” its claim by adding these new factual allegations and legal theories. To allow Methanex to amend its claim at this juncture – after the Tribunal had already set a briefing schedule on jurisdiction and admissibility with which the United States complied and set a hearing date – to allege new facts and new legal theories that were known to it at the time it filed its Statement of Claim would prejudice the United States. The Tribunal, therefore, should deny Methanex’s request.

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<sup>72</sup> See, e.g., Dan Morain, *Wealth Buys Access To State Politics; Donors: A Small But Diverse Group Leads Campaign Giving In California. And Some Of Them Appear To Be Reaping Huge Rewards*, L.A. TIMES, Apr. 18, 1999, at A1.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (a) in favor of the United States and against Methanex, dismissing Methanex's claims in their entirety and with prejudice; (b) pursuant to Article 20 of the UNCITRAL Arbitration Rules, disallowing Methanex's proposed amended claims; and (c) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that Methanex bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

*Respectfully submitted,*

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